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In The

Supreme Court of the United States

LAURANCE LOWENSCHUSS, Trustee of the Fred Lowenschuss Associates Attorneys at Law Pension Plan,

Petitioner,

v.

BEVERLY SELNICK,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

MICHAEL R. GRIFFINGER
Counsel of Record
JAMES N. LAWLOR
GIBBONS, DEL DEO, DOLAN, GRIFFINGER & VECCHIONE, A PROFESSIONAL CORPORATION
One Riverfront Plaza
Newark, New Jersey 07102
(973) 596-4500
Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1. Whether an employee pension benefit plan that has been properly established and maintained pursuant to ERISA can nonetheless lose its ERISA-qualified status through the mere attrition of participants.

2. Whether 11 U.S.C. § 541(c)(2) of the Bankruptcy Code invalidates certain non-bankruptcy law protections for pension benefits.

PARTIES TO THE PROCEEDING

The parties to this proceeding are petitioner Laurance Lowenschuss, Trustee of the Fred Lowenschuss Associates Attorneys at Law Pension Plan, a party in interest, Fred Lowenschuss, a debtor in the underlying Chapter 11 proceedings under the Bankruptcy Code and a holder of a beneficial interest in the Fred Lowenschuss Associates Attorneys at Law Pension Plan, and respondent Beverly Selnick, a creditor of Fred Lowenschuss and an alleged owner of 38.7% of Fred Lowenschuss's interest in the Fred Lowenschuss Associates Pension Plan by operation of a 1991 divorce decree.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Laurance Lowenschuss, Trustee of the Fred Lowenschuss Associates Attorneys at Law Pension Plan, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-24a) is reported at 171 F.3d 673. The opinion of the district court (App., *infra*, 26a-38a) is unreported. The opinion of the bankruptcy court (App., *infra*, 39a-69a) is reported at 202 B.R. 305.

JURISDICTION

The court of appeals entered its judgment (App., *infra*, 1a- 24a) on March 17, 1999. A petition for rehearing and suggestion for rehearing *en banc* was filed on March 31, 1999, and was denied by the court of appeals (App., *infra*, 70a) by order dated April 28, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Although numerous provisions of the Bankruptcy Code and the Employee Retirement Income Security Act are implicated by this matter, the critical provisions include 11 U.S.C. § 541(c)(2) of the Bankruptcy Code, which provides in relevant part that

> A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable

> under applicable nonbankruptcy law is enforceable in a case under this title.

In addition, 29 U.S.C. § 1341(a) of ERISA, provides, in relevant part, that:

> **(a) General rules governing single-employer plan terminations**
>
> **(1) Exclusive means of plan termination**
>
> Except in the case of a termination for which proceedings are otherwise instituted by the corporation as provided in section 1342 of this title, a single-employer plan may be terminated only in a standard termination under subsection (b) of this section or a distress termination under subsection (c) of this section.

STATEMENT OF THE CASE

Factual Background

The case arises out of a Chapter 11 reorganization filed by debtor, Fred Lowenschuss ("Debtor"), in the United States Bankruptcy Court for the District of Nevada ("Bankruptcy Court") pursuant to 28 U.S.C. § 157. The Bankruptcy Court held that the debtor's beneficial interest in the Fred Lowenschuss Associates Attorneys at Law Pension Plan ("Pension Plan"), an ERISA-qualified plan, was property of the bankruptcy estate under 11 U.S.C. § 541(a) (App., *infra* 63a). The United States District Court for the District of Nevada ("District Court") affirmed pursuant to an appeal under 28 U.S.C. § 158(a). The Ninth Circuit affirmed in an appeal pursuant to 28 U.S.C. § 158(d) (App., *infra*, 1a), after authorizing the petitioner Pension Plan Trustee to intervene (App., *infra*, 25a).

Fred Lowenschuss Associates ("FLA"), a professional corporation, established the Pension Plan in 1976 under

Pennsylvania law and in accordance with the Employee Retirement Income Security Act ("ERISA"). The Pension Plan was amended from time to time to comply with ERISA and the Internal Revenue Code ("IRC"). After each amendment, the Internal Revenue Service ("IRS") found the Pension Plan to be in compliance with the IRC. The Pension Plan contained an anti-alienation clause, a specific restriction on alienation by a participant in the fund as required by ERISA and the IRC.

Over the Pension Plan's life span, FLA had 18 employees that participated in the Pension Plan, in addition to the participation of FLA's founder and former sole shareholder, Fred Lowenschuss.[1] The employee participants eventually left FLA and either received their vested benefits or lost their unvested benefits. It is undisputed that one such employee participant received and rolled over pension benefits of more than $140,000 from the Pension Plan in 1985.

In October 1981, Beverly Selnick ("Selnick") commenced a divorce action in the Court of Common Pleas, Montgomery County, Pennsylvania against Fred Lowenschuss. After years of acrimonious litigation, a decree of divorce awarded Selnick, among other things, thirty-eight and $^{7}/_{10}$ percent of the value of Fred Lowenschuss's pension benefits, plus interest. The divorce court entered a final money judgment of $5,345,090 in March 1992 against Fred Lowenschuss and allegedly the Pension Plan ("Selnick Judgment"). The state court purposely declined entering a qualified domestic relations order, or "QDRO,"

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[1] Fred Lowenschuss was not even the sole owner of the sponsor on the relevant dates in this appeal, as he held the stock in trust for his sons since 1985.

which would have been mandatory under ERISA had the court intended to grant Selnick a property interest in Fred Lowenschuss's beneficial interest in the Pension Plan. *See Boggs v. Boggs*, 520 U.S. 833, 117 S. Ct. 1754, 138 L. Ed. 2d 45 (1997). Thus, Selnick was simply a money judgment creditor of Fred Lowenschuss, although she also obtained a disputed money judgment against the Pension Plan.

Concurrent with the divorce proceedings, Selnick's lawyers had also filed suit against Fred Lowenschuss, and ultimately the Pension Plan, on behalf of another client, Resorts International, Inc. ("Resorts"), a claim later reduced to a $5.8 million judgment (only recently reversed on appeal). The two claims would have dissipated the Pension Plan assets available for distribution. Moreover, a withdrawal from the Pension Plan (contrary to the anti-alienation clause) to make a payment on any judgment would have resulted in a huge IRS levy. Thus, because the claims of Selnick and Resorts exceeded the value of Fred Lowenschuss's interest in the Pension Plan and his other assets, he filed for bankruptcy protection.

On August 24, 1992 (the "Petition Date"), Fred Lowenschuss filed for relief in Nevada as a debtor-in-possession under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101-1330 ("Bankruptcy Code"). The Debtor's schedule of assets listed his interest in the Pension Plan as exempt and excluded property.

The Debtor had set up residence in Nevada after leaving Pennsylvania. Prior to the Chapter 11 filing, the Debtor's son, Laurance Lowenschuss, was appointed as the sole Trustee of the Pension Plan in place of the Debtor. Except for small portions of Pension Plan assets that were contributed for the Debtor's two sons, the bulk of the assets represented the Debtor's beneficial interest.

Proceedings In The Bankruptcy And District Courts.

Despite having failed to obtain a QDRO, Selnick attempted to reach directly the Pension Plan's assets by opposing the Debtor's exclusion of his interest from his bankruptcy estate. Selnick argued that the Debtor was the sole participant in the plan on the Petition Date and, therefore, that the plan was no longer ERISA qualified. However, she did not convince the Bankruptcy Court that the Debtor's interest in the Pension Plan must be included in his estate, and it was ruled to be excluded.

The Debtor's proposed reorganization plan was filed on March 8, 1993 in reliance on the exclusion of the Debtor's beneficial interest in the Pension Plan. On May 26, 1993, Selnick filed an objection to the plan. By Order dated October 28, 1993, ("Confirmation Order"), the Bankruptcy Court confirmed the plan ("Confirmed Plan"). Selnick, the only creditor who objected to the Confirmed Plan, appealed both the exclusion of the Debtor's pension benefits and the Confirmation Order. Selnick did not obtain a stay of the Confirmation Order or the Confirmed Plan.

Without the stay, however, the Debtor's reorganization plan was fully implemented and substantially consummated by distributions from his beneficial interest in the Pension Plan. Many of the checks provided by the Pension Plan and endorsed by Selnick included a release of the Pension Plan.

On August 19, 1994, the District Court vacated the Bankruptcy Court's order excluding the Debtor's pension assets and remanded the matter to the Bankruptcy Court to take additional evidence as to whether the Pension Plan qualified under ERISA. Simultaneously with the

remand, the District Court stayed the appeal of the Confirmation Order pending a resolution of the exclusion issue. No court, however, stayed the implementation of the Confirmed Plan so that the distributions required to be made to Selnick under the Confirmed Plan continued. The Debtor timely filed a Notice of Appeal to the United States Court of Appeals for the Ninth Circuit on August 30, 1994. On October 31, 1994, the Pension Plan Trustee filed a Motion to Intervene. On December 9, 1994, the Debtor's appeal was dismissed for lack of jurisdiction after the circuit court concluded that the remand order was not a final order.

On remand, the Bankruptcy Court acted as if the Confirmation Order had been reversed or at least its implementation stayed, and held additional hearings on the Pension Plan exemption and exclusion issues during October 1995. The Bankruptcy Court entered a November 1, 1996 Order and decision (App., *infra*, 39a-69a) that held, contrary to its prior ruling, that the Debtor's beneficial interest in the Pension Plan *was* property of the estate and not excluded ("Inclusion Order"). The court also ruled that since the Debtor was *the only remaining participant in the Pension Plan on the Petition Date*, the previously ERISA-qualified Pension Plan was no longer ERISA-qualified within the meaning of *Patterson v. Shumate*, 504 U.S. 753, 112 S. Ct. 2242, 119 L. Ed. 2d 519 (1992).

Further Appellate Proceedings

The Debtor appealed the Inclusion Order pursuant to a Notice of Appeal dated November 8, 1996. The decision was affirmed by the District Court by Order dated February 4, 1998. App., *infra*, 38a. The Debtor timely filed a notice of appeal to the Ninth Circuit on February 18,

1998, and the Ninth Circuit permitted the Pension Plan Trustee to intervene in the appeal by Order dated April 17, 1998. *Id.* at 25a.

On March 17, 1999, the Ninth Circuit affirmed the lower courts. *Id.* at 1a. In affirming the lower courts, the Ninth Circuit focused on whether the anti-alienation provision in the Pension Plan was enforceable on the Petition Date. The court found that because, other than the Debtor, there were no "employee participants" left in the plan (as defined in a Department of Labor regulation governing the *establishment* of an ERISA benefit plan), the Pension Plan was no longer subject to ERISA. *Id.* at 11a. The court rejected arguments that, once established, an ERISA benefit plan always remains subject to ERISA unless terminated in accordance with ERISA. *Id.* at 11a-12a. The panel also found that the degree of the Debtor's control of the Pension Plan through his roles as alleged sole shareholder of FLA, as trustee, as plan administrator and as largest beneficiary were policy reasons for refusing to find ERISA applicable. *Id.* at 12a-13a.[2]

The Ninth Circuit also ruled that a Pennsylvania statute that facially excluded the Pension Plan from property of the Debtor's estate was unenforceable in the Bankruptcy Court. *Id.* at 15a-17a. The panel reasoned that the Bankruptcy Code limited the exclusion of pensions to express trusts with anti-alienation clauses enforceable under state law and that state laws that purport to

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[2] The Ninth Circuit also concluded that Selnick's releases of the Pension Plan were not enforceable by operation of a July 27, 1995 status conference order entered by the Bankruptcy Court. App., *infra*, 7a. Notably, however, the Pension Plan was not a party to that order, and the relief granted was without prejudice to the defenses of any party.

exclude pension funds regardless of the existence of an anti-alienation clause are not enforceable in bankruptcy.

By Order dated April 28, 1999 (*id.* at 70a), the Ninth Circuit denied the Pension Plan Trustee's petition for rehearing and suggestion for rehearing *en banc*.

REASONS FOR GRANTING THE PETITION

1. Conflict Among The Circuit Courts

The Ninth Circuit has admitted (*id.* at 17a) that its refusal to enforce state laws that protect retirement funds from the reach of creditors conflicts with the prior decisions of two circuit courts, *Meehan v. Wallace (In re Meehan)*, 102 F.3d 1209 (11th Cir. 1997), and *In re Yuhas*, 104 F.3d 612 (3d Cir.), *cert. denied*, 521 U.S. 1105, 117 S. Ct. 2481, 138 L. Ed. 2d 990 (1997). Although the Ninth Circuit did not expressly recognize it, its recent ruling also conflicts with a prior ruling by the Fourth Circuit in *Madonia v. Blue Cross and Blue Shield of Va.*, 11 F.3d 444 (4th Cir. 1993), *cert. denied*, 511 U.S. 1019, 114 S. Ct. 1401, 128 L. Ed. 2d 74 (1994) with respect to an employee benefits plan's loss of ERISA status through mere attrition of participants (App., *infra*, 11a-12a).

2. Important Public Issues

The Ninth Circuit's decision can be expected to have a profound and wide-ranging impact on small business pension plans. At best, the decision confuses the jurisprudence with respect to the duration of ERISA-qualified benefit plans. The ruling also evokes important national issues concerning the interrelation of the Bankruptcy Code and ERISA. This Court has the opportunity to resolve the disputes before they can cause further confusion and inconsistent treatment of pension benefits both in and out of the bankruptcy context.

I. THE NINTH CIRCUIT'S RULING, WHICH HOLDS THAT SINGLE EMPLOYER PENSION PLANS CAN SIMPLY "FALL OUT" OF THE REQUIREMENTS AND PROTECTIONS OF ERISA, CONFLICTS WITH THE DECISIONS OF AT LEAST ONE OTHER CIRCUIT COURT AND PRESENTS A CRITICAL QUESTION AS TO THE UNIFORM INTERPRETATION OF ERISA

Congress enacted ERISA to remedy the abuses of prior pension and welfare benefit systems and to encourage employers and employees to create and preserve retirement savings. Because Congress intended ERISA's application to be broad, thousands of pension plans are potentially impacted by decisions that determine whether or not a particular plan remains governed by ERISA. Once established as ERISA benefit plans, several courts and other authorities have concluded that such plans always remain subject to ERISA unless terminated in the manner expressly set forth in the statute.

Now, in an opinion that could be disastrous for small business pension plans, the Ninth Circuit has held an employee benefit plan governed by ERISA can indeed "fall out" of the protections of that statute. App., *infra*, 11a-12a. The appellate court has effectively ruled that attrition of employee-participants in a benefit plan that ultimately leaves the small business owner as the sole remaining participant results in the loss of ERISA protections for his pension benefits. The decision is a disincentive to small business owners and threatens to exacerbate a critical problem – the lack of retirement planning by such owners for their employees, more than two-thirds of which are presently not covered by a retirement plan at all. *See* Advisory Coun. on Emp. Welf. & Ben. Plans, Report of the Working Group on Small Business: How to

Enhance and Encourage the Establishment of Pension Plans, *11 (Nov. 13, 1998) (available on the internet at www.dol.gov/dol/pwba). The ruling, which conflicts with decisions of the Fourth Circuit and an Eighth Circuit district court and is also contrary to Department of Labor ("DOL") advisory opinions, ignores the plain language of ERISA. The decision also runs counter to this Court's recent jurisprudence with respect to employee benefit plans.

A Writ of Certiorari should be granted because the question is one of exceptional national importance to the administration of small business pension plans that are governed by ERISA. Issuance of a writ is necessary to eliminate inconsistent rulings by the Fourth and Ninth Circuits. It is an issue of first impression that has not, but should be, settled by this Court. Sup. Ct. R. 10.1(c).

A. The Statutory Scheme And Policies Behind ERISA Support The Conclusion That The Pension Plan Was Subject To ERISA Throughout Its Existence, Making The Ninth Circuit's Ruling Erroneous.

In 1974, Congress concluded that the haphazard laws and regulations regarding pension and welfare plans needed to be entirely revamped. ERISA was therefore "designed to ensure the proper administration of pension and welfare plans," and "to protect plan participants and beneficiaries." *See* 29 U.S.C. § 1001; *Boggs v. Boggs*, 520 U.S. 833, 839, 117 S. Ct. 1754, 138 L. Ed. 2d 45 (1997). These protections were enacted, in part, "to remedy abuses by employers who manage pension plan assets held in trust for workers in traditional employer-employee relationships." *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142, 105 S. Ct. 3085, 87 L. Ed. 2d 96 (1985).

ERISA was not only intended to protect employees from dishonest employers, it was also enacted with an eye towards protecting pension benefits from the reach of creditors so that they would be available during a beneficiary's old age. *See Guidry v. Sheet Metal Workers Nat. Pension Fund*, 493 U.S. 365, 110 S. Ct. 680, 107 L. Ed. 2d 782 (1990) ("Section 206(d) reflects a considered congressional choice, a decision to safeguard a stream of income for pensioners . . . , even if that decision prevents others from securing relief for the wrongs done them. If exceptions to this policy are to be made, it is for Congress to undertake that task."). *See also Patterson v. Shumate*, 504 U.S. 753, 764, 112 S. Ct. 2242, 119 L. Ed. 2d 519 (1992) (excluding ERISA benefits from bankruptcy estates "gives full and appropriate effect to ERISA's goal of protecting pension benefits"). Thus, Congress has decided that pension benefits covered by the statute are to be closely guarded and all but unreachable by creditors.

1. ERISA Is Broadly Drafted To Cover Most Benefit Plans.

The types of plans that constitute employee benefit plans that are subject to ERISA are diverse and wide-ranging. ERISA makes any "employee benefit plan" subject to ERISA if it is an "employee pension benefit plan." 29 U.S.C. § 1002(3); 1003(a). An employee pension benefit plan or "pension plan" is defined as

> any plan, fund or program which is heretofore or hereafter established or maintained by an employer . . . to the extent that by its express terms or as a result of the surrounding circumstances such plan, fund or program (i) provides retirement income to employees or (ii) results in a deferral of income by employees for periods

> extending to termination of covered employees or beyond. . . .

29 U.S.C. § 1002(2)(A). ERISA further defines "employee" as "any individual employed by an employer." § 1002(6). An employer is "any person acting as an employer. . . . " § 1002(5). Finally, a participant in a pension plan "mean[s] any employee or former employee of an employer . . . who is or may become eligible to receive a benefit of any type form an employee benefit plan which covers employees of such employer. . . . " § 1002(7). The Debtor, as an employee of FLA, a corporate entity, participated in the Pension Plan. The Pension Plan is an express fund established to pay retirement benefits and clearly satisfies the definition of an employee benefit plan in ERISA. Thus, even if the Pension Plan had no employee participants other than the Debtor, under the plain language of ERISA, the Pension Plan would still be subject to ERISA.

The Department of Labor (the "DOL") enacted a regulation that limits when an employee benefit plan can become subject to ERISA. 29 C.F.R. § 2510.3-3(b) states that an employee benefit plan that lacks employees as participants is not governed by ERISA. 29 C.F.R. § 2510.3-3(c)(1) provides that for purposes of that regulation, the DOL will not deem an employee to be a participant if he is both the sole participant and the sole shareholder of the corporate employer sponsoring the plan. Thus, assuming that the regulation is valid, unless an employee that is not a sole shareholder of the corporate sponsor also participates in the benefit plan, no employee benefit plan is established under ERISA. The DOL regulation, however, does not purport to address when an already-established plan ceases to be governed by ERISA.

2. Working Owners Are Protected Participants In Benefit Plans.

While a benefit plan may never become "established" within the scope of ERISA if it does not include a non-owner participant, Congress did not overlook the fact that sole proprietors, general partners and sole owners of corporations, *i.e.*, working owners, are likely to be actual participants and beneficiaries of such plans.[3] In fact, the DOL has advised that when passing ERISA, Congress also intended to protect the interests of owner/participants in pension plans. *See* Dep't of Labor, Op. No. 99-04A, 1999 WL 64920 (E.R.I.S.A.) (opining on self-employed business owners in multi-employer pension plan). According to the DOL:

> In our view, the statutory provisions of ERISA, taken as a whole, reveal a clear Congressional design to include working owners within the definition of participant for purposes of Title I of ERISA. Congress could not have intended that a pension plan operated so as to satisfy the complex tax qualification rules applicable to benefits provided to "owner-employees" under the provisions of Title II . . . , and with respect to which an employer faithfully makes the premium payments required to protect the benefits payable under the plan to such individuals under Title IV . . . , would somehow transgress against the limitations of the definitions contained in Title I. . . . Such a result would cause intolerable conflicts between the separate titles

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[3] 29 U.S.C. § 1135 authorizes the Secretary of Labor to "prescribe such regulations as he finds necessary or appropriate to carry out the provisions of this [ERISA] subchapter." *See also In re Watson*, 161 F.3d 593, 596 (9th Cir. 1998).

> of ERISA, leading to the sort of absurd results that the Supreme Court warned against. . . .

Id. at *4 (emphasis supplied). The DOL has further noted that nothing contained in the ERISA statute precludes owner-employees from being participants in employee benefit plans. *Id.* Rather, if the pension plan satisfies 2510.3-3(c)(1) by having at least one non-owner participate, the plan is governed by ERISA. In such a case, a working owner that also participates would also be entitled to the same protections that such a non-owner employee receives under ERISA.

With respect to the sole shareholders of corporate entities, the Fourth Circuit has agreed with the DOL's position. *Madonia v. Blue Cross and Blue Shield of Va.*, 11 F.3d 444, 449 (4th Cir. 1993), *cert. denied*, 511 U.S. 1019, 114 S. Ct. 1401, 128 L. Ed. 2d 74 (1994). In *Madonia*, the panel held that once an employee benefit plan is established under ERISA, a sole shareholder may still qualify as an employee and therefore be a participant whose benefits are subject to ERISA. *Id.* at 448-49. The Fourth Circuit noted that there was neither a basis for disregarding the corporate form to prevent the shareholder's benefits from being subject to ERISA nor a good policy reason to develop two different bodies of law to govern corporate employees. *Id.* at 450. In so ruling, the circuit panel limited the application of regulation 2510.3-3 to its plain language and intent – determining whether an ERISA benefit plan was ever established. *Id.* Once an ERISA plan is established, according to the circuit court, relying on the regulation to determine whether a sole shareholder was a "participant" was incorrect as the regulation was not intended to be used for such purposes. *Id.* Rather, the focus must then turn to the statute.

3. Termination Of Plans Can Only Occur In Conformity With ERISA.

Once an employer establishes a benefit plan that is governed by ERISA, Congress has limited the ability to escape from ERISA's statutory web. In fact, ERISA expressly provides the narrow means by which a plan administrator may terminate a single-employer plan:

> **(a) General rules governing single-employer plan terminations**
>
> **(1) Exclusive means of plan termination**
>
> Except in the case of a termination for which proceedings are otherwise instituted by the corporation as provided in section 1342 of this title, a single-employer plan may be terminated only in a standard termination under subsection (b) of this section or a distress termination under subsection (c) of this section.

29 U.S.C. § 1341 (emphasis in original).[4] The recent decision of this Court in *Hughes Aircraft Co. v. Jacobson* has concluded that section 1341(a) means what it expressly states – it is the exclusive avenue for plan termination. 67 U.S.L.W. 4122, 119 S. Ct. 755, 765, 142 L. Ed. 2d 881 (1999). The Court rejected the argument that – whether by accident or design – a single-employer plan can be terminated by a plan sponsor in any manner other than pursuant to the circumstances spelled out in section 1341(a)(1). *Hughes Aircraft*, 119 S. Ct. at 765. Specifically, the Court stated:

> Based upon the language of the statute, these means [*i.e.*, standard and distress terminations]

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[4] The Pension Benefit Guaranty Corporation is permitted to involuntarily terminate a plan by operation of 29 U.S.C. § 1342.

> constitute the *sole* avenues for voluntary termination.

Id. (emphasis supplied). The Ninth Circuit acknowledged that no one had ever initiated a standard or distress termination in this case. App., *infra*, 12a.

There are no exceptions to the termination requirements of ERISA, even in the bankruptcy context. *See In re Esco Mfg. Co.*, 50 F.3d 315, 316 (5th Cir. 1997) (per curiam). In *Esco*, the Fifth Circuit reversed a district court's order that purported to compel a bankruptcy trustee to terminate an employee benefit plan. The decision concluded that the trustee, who represented the plan's bankrupt corporate sponsor, had no right to terminate the plan, as the plan administrator has the sole authority to terminate a pension plan. *Id.* The court noted that while the debtor may decline to fulfill its duties as the plan's sponsor, it would not be relieved of liability nor would such actions constitute a termination of the plan within the meaning of the statute. *Id.*

If an employee benefits plan cannot be terminated by failing to comply with the provisions of ERISA, it is incomprehensible that the same plan can be terminated through simple attrition of non-owner employees. In the only reported "attrition" case, a district court concluded that the attrition of employees could not result in pension benefits being free from the requirements and protections of ERISA. *See In re Craig*, 204 B.R. 750, 754-755 (D.N.D. 1996). The district court ruled that the debtor's sole shareholder status while participating in the plan was not violative of ERISA and, therefore, his benefits were protected by the provisions of ERISA. *Id.* In so ruling, the *Craig* Court relied on the Fourth Circuit's decision in

Madonia, which had limited the application of DOL regulation 2510.3-3. *Id.* at 753-54.[5]

Even if a sole shareholder cannot be considered a participant, he nonetheless is entitled to the protections of ERISA as long as there were other participants in the Pension Plan. Since 1981, the DOL has taken the position that, for purposes of Title I of ERISA, an employee benefit plan does not cease to be governed by ERISA *even after such a plan is terminated*. *See* U.S. Dep't of Labor, Op. No. 81-60A, 1981 WL 17783, *2 (E.R.I.S.A.). Critically, the DOL has opined that it is irrelevant as to whether a plan's sponsor no longer has "employees that are participants" as defined by 29 C.F.R. § 2510.3-3. *Id.* According to the DOL, an employee benefit plan *continues* to be governed by Title I of ERISA even if there are *no* participants remaining in the plan. *Id.* Thus, the DOL has rejected the argument that a pension plan can "fall out" of ERISA as a result of an implied termination or loss of non-owner employees.

B. The Ninth Circuit's Failure to Adhere To ERISA's Statutory Scheme Creates A Split With The Fourth Circuit That Threatens To Undermine The Purposes Of ERISA.

Without explaining as to how and when the Pension Plan "fell out" of ERISA, the Ninth Circuit concluded that the "Debtor could not have enforced the transfer restriction in the Pension Plan . . . outside of bankruptcy, [so] he

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[5] The *Craig* Court also relied on dicta in an Eighth Circuit opinion that approved of the reasoning of *Madonia* in addressing the ERISA issue. *See Robinson v. Liomaz*, 58 F.3d 365, 369 (8th Cir. 1995) ("we are inclined to believe that the *Madonia* court's approach was correct").

cannot now enforce it under 11 U.S.C. 541(c)(2)." App., *infra*, 13a. The panel suggested that the Debtor's control over the Pension Plan was counter to the purposes of ERISA. In addition to its erroneous public policy basis for finding the Pension Plan not to be subject to ERISA, the Ninth Circuit also relied heavily on regulation 2510.3-3 in ruling that there were no participants because the Debtor was a working owner.

The panel emphasized that its decision was not a ruling that the Pension Plan had "terminated" under ERISA. App., *infra*, 12a n.8. Rather, the court conceded that the Pension Plan was once governed by ERISA because it had employees other than the Debtor that were participants, but at some indeterminate point converted to a plan that was *not* governed by ERISA because the Debtor was the only remaining participant on the Petition Date. The only reasonable conclusion one can draw from the opinion is that this "falling out" of ERISA resulted from attrition of non-owner participants.

The decision must be reversed because it represents an abject failure to follow the plain language of ERISA. First, the "control" reasoning advanced by the Ninth Circuit is inconsistent with prior precedent. In *Patterson v. Shumate*, 504 U.S. 753, 112 S. Ct. 2242, 119 L. Ed. 2d 519 (1992), in which the debtor was the sole remaining participant and owned 96% of the employer corporation, the Court ruled that his interest in the assets of his pension were not property of his bankruptcy estate. *See also In re Baker*, 114 F.3d 636, 639 (7th Cir. 1997) (fact that debtor was majority shareholder controlling plan sponsor was not relevant). Focusing on what the Debtor, as the small business owner, may or may not be able to do with his pension benefits is not a relevant inquiry. The ruling

ignores the corporate form as if it has no importance and overlooks the fact that the Debtor is still subject to the prohibition against alienation clause in the Pension Plan itself (along with the tax and ERISA liability that a violation of that provision creates). Furthermore, if the Pension Plan is subject to ERISA, the releases discounted by the panel should be considered enforceable under ERISA against Selnick in accordance with *Lockhead v. Spink*, 517 U.S. 882, 116 S. Ct. 1783, 1791, 135 L. Ed. 2d 153 (1996).

Second, the Pension Plan Trustee does not contest that ERISA cannot extend to a pension plan that *never* had non-owner participants. In fact, the cases are clear that one cannot establish an ERISA benefits plan unless one or more non-owner employee participates. *See, e.g., Slamen v. Paul Revere Life Ins. Co.*, 166 F.3d 1102, 1105 (11th Cir. 1998).

What the Pension Plan Trustee contests is the Ninth Circuit's unsupported conclusion that a benefit plan that is subject to ERISA can nonetheless cease to be governed by that statute in any manner other than that set forth by Congress. The two reported cases that involve similar facts, *Madonia* and *In re Craig*, hold to the contrary.[6] In

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[6] The Ninth Circuit's ruling is also inconsistent with its own ruling in *Peterson v. American Life & Health Ins. Co.*, 48 F.3d 404 (9th Cir.), *cert. denied*, 516 U.S. 942, 1165 S. Ct. 377, 133 L. Ed. 2d 301 (1995), in which it held that, as a matter of law, an employee benefit plan continued to be governed by ERISA because the plan "*originally* covered a non-partner employee in addition to Peterson and his partner." *Id.* at 408 (emphasis supplied). The Ninth Circuit panel relied upon the ERISA definition of employee benefit plan, which states that both pension and health and welfare plans are governed by ERISA, if they are "established or maintained by an employer . . . for the

reaching the opposite conclusion, their analyses are much more compelling.

In particular, both cases recognize that once established, an ERISA benefit plan can *only* cease to be governed by ERISA in the manner specified by Congress. By contrast, the Ninth Circuit has opened up the flood gates for "equitable" termination of ERISA plans. Notably, this Court declined to find equitable exceptions to ERISA's termination provisions. *See, e.g., Hughes Aircraft*, 119 S. Ct. at 764.

Furthermore, the Ninth Circuit improperly expanded the applicability of the DOL regulation to exclude working owners from being "participants" in already-established benefit plans. The *Madonia* and *Craig* courts correctly hold that the DOL provision is to be used to determine whether an ERISA plan was *established* – a fact conceded here – not whether a plan *continues in existence* under ERISA. The Ninth Circuit ruling has clearly expanded the scope of regulation 2510.3-3 beyond its stated purpose. Moreover, the *Madonia* and *Craig* decisions are in harmony with the DOL's pronouncement that working owners are entitled to the protections of ERISA, while the Ninth Circuit's ruling is directly to the contrary.

C. The Importance And Impact Of The Ninth Circuit's Ruling On Small Business Pension Plans Cannot Be Discounted

The threat to small business employee pension plans from the Ninth Circuit's reasoning should be easy to

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purpose of providing [such benefits] for its participants or their beneficiaries." 29 U.S.C. § 1002(1). The Ninth Circuit in *Peterson* rejected the argument that the loss of the non-owner employee caused the plan to fall out of the protections of ERISA. *Id.*

recognize. According to the DOL's Pension Benefit & Welfare Administration, businesses with 100 or fewer employees employ approximately forty million Americans (roughly forty percent of the non-government work force). *See* PWBA Press Rel: Labor Dep't Unveils New Interactive Web Site for Small Businesses (June 2, 1998) (available on the internet at www.dol.gov/dol/pwba). The Secretary of Labor has estimated, however, that " 'only about one-fifth of the . . . five million small businesses provide some form of pension plan for their employees.' " *Id.*

The holding that an ERISA-qualified pension plan could lose its ERISA qualification through attrition of participants creates a dangerous precedent for, and particularly impairs the retirement earnings of, both employees and owners of small businesses. With only one in five small businesses presently providing pension benefits, owners are even less likely to elect to become participants of ERISA plans if the simple act of attrition of his or her employees could lead to loss of ERISA qualification (with a concomitant loss of the protection of his pension and the tax advantages of an ERISA-qualified pension plan). Contrary to the goal of ERISA to increase retirement imcome, small business owners that are the sole remaining participants in their plans are in serious jeopardy of having their benefits subject to attachment by creditors and to massive claims for unpaid taxes. Can this be what Congress intended when enacting ERISA?

The DOL has answered in the negative and concluded that Congress intended for working owners to also enjoy the protections of ERISA. The DOL's conclusion is supported by this Court's recent ruling that while Congress primarily intended ERISA to protect employees,

it does not follow that employers should be deprived of the "benefits incidental" to ERISA. *See Hughes Aircraft*, 119 S. Ct. at 764. This Court made it clear that an employer that sponsors an ERISA pension plan is entitled to reap those incidental benefits. *Id.* Thus, a small business owner that sponsors a pension plan for the benefit of his employees should also be permitted to reap the incidental benefit of protecting his own retirement funds.

The ruling also draws a completely arbitrary line between plans with at least one remaining employee/participant and plans with no remaining employee/participants. *See Madonia*, 11 F.3d at 450. For example, a debtor who is the sole shareholder of the sponsor of a pension plan that files a bankruptcy petition while he still had *one* employee/participant, would have his pension plan interest governed by ERISA and therefore excluded from the bankruptcy estate, whereas a debtor who has no remaining employee/participants would not be protected. There is no valid reason to distinguish these two situations. Indeed, the panel failed to even suggest one other than to cite to the general proposition that ERISA is designed to protect employees from employers.

In addition to the unintended development of two separate bodies of case law interpreting ERISA, the Ninth Circuit's ruling creates substantial uncertainty with respect to plan administration. For example, ERISA sets forth the specific obligations that plan administrators must follow. *See, e.g.*, 29 U.S.C. §§ 1021, 1022, 1023, 1024, 1025, 1026, 1027. In the case of plans covering small businesses, the plan administrator's obligations at any particular time (including obligations to plan beneficiaries) would depend on whether the plan's sponsor had any non-owner employees at that time. There are no cases

or regulations supporting this proposition. It is submitted that once a pension plan is multi-participant and ERISA-qualified, a debtor is entitled to protection even though he is the last remaining participant.

A writ should be granted in this case because the question is one of critical national importance to the administration of small business pension plans governed by ERISA. ERISA's goals and purposes are undermined by any ruling that allows an employee benefit plan to "fall" from the protections and requirements of such a comprehensive statute. The issuance of a writ is also necessary to eliminate clearly inconsistent rulings by the Fourth and Ninth Circuits. It is an issue of first impression that has not, but should be, settled by this Court. Sup. Ct. R. 10.1(c).

II. THE NINTH CIRCUIT'S OPINION INTERPRETING THE BANKRUPTCY CODE'S LIMITATIONS ON WHAT CONSTITUTES PROPERTY OF THE ESTATE IS CONTRARY TO THE OPINIONS OF TWO OTHER CIRCUIT COURTS AND CREATES CONFUSION OVER AN IMPORTANT CODE PROVISION.

When passing the modern Bankruptcy Code in 1978, Congress chose to make most of a debtor's legal and equitable interests in property part of his bankruptcy estate. 11 U.S.C. § 541(a). Congress did place certain limitations, however, on what constitutes property of the estate, particularly with respect to retirement plans. For example, section 541(c) of the Code makes enforceable in a bankruptcy case a restriction on the transfer of a debtor's beneficial interest in a trust if that restriction is enforceable in the non-bankruptcy context. § 541(c)(2).

Although it is an exception to the general rule, Congress was explicit in seeking uniform enforcement of restrictions on transfers of beneficial interests in property recognized under state law and federal non-bankruptcy law. *See Patterson v. Shumate*, 504 S. Ct. 753, 758, 112 S. Ct. 2242, 119 L. Ed. 2d 519 (1992).

Many states have enacted statutes that seek to shield retirement funds, individual retirement accounts, 401(k) plans and the like from garnishment, levy or the enforcement of judgments, whether or not such plans contain an anti-alienation clause. One such state is Pennsylvania, which enacted 42 Pa. Cons. Laws Ann. § 8124(b), which, by its express terms, prevents the garnishment or levy of pension funds that (i) contain an anti-alienation provision, § 8124(b)(1)(vii); (ii) are for a self-employed person provided that the contributions were made while the person was solvent, § 8124(b)(1)(viii); or (iii) are tax qualified under the IRC, § 8124(b)(1)(ix). Thus, unlike ERISA pension plans and state spendthrift trusts, not all of the retirement vehicles protected by the state statute need to contain an anti-alienation clause. The statutes, however, themselves purport to contain the restriction on transfer of the benefits by making, in the case of Pennsylvania, the pension "exempt from attachment or execution on a judgment." § 8124(b)(1). The first two circuits to consider whether a particular statute is enforceable under section 541(c)(2), the Eleventh and Third Circuits, have decided in the affirmative.

The Ninth Circuit, however, has erroneously rejected the enforcement of these statutes in the bankruptcy context. The Pension Plan, which does contain an anti-alienation provision and which, by its terms, is governed by Pennsylvania law, satisfies the requirements of section 8124(b). Yet, the Ninth Circuit refused to enforce the statute. To come within the scope of section 541(c)(2)'s

exclusion, the panel reasoned, the restriction enforceable under non-bankruptcy law must be *in the trust document itself*, and not in the state statute. According to the Ninth Circuit, the fact that section 8124(b) operated to exclude retirement plans, IRAs and the like regardless of whether they contained an anti-alienation clause was fatal to the enforcement of that statute in the bankruptcy context. App., *infra*, 17a.

A Writ of Certiorari should be granted because the split among the circuits has led to two opposite interpretations of the very same statutory language. For example, the Ninth Circuit, relying on *dicta* in *Patterson*, emphasized that "a debtor's interest . . . may be excluded . . . only if the trust contains the transfer restriction and that restriction is enforceable under applicable nonbankruptcy law." App., *infra*, 1a. By contrast, the Third Circuit flatly stated that the *Patterson* Court "did not say that a debtor may exclude a trust *only* if it, as opposed to the statute contains such a restriction." *In re Yuhas*, 104 F.3d at 16 n.3. The question is also one of great importance to the future interpretation of the Bankruptcy Code and the enforceability of applicable non-bankruptcy law. It is an issue of first impression that has not, but should be, settled by this Court. Sup. Ct. R. 10.1(c). As the Ninth Circuit has ruled definitively that the type of non-bankruptcy laws at issue are not enforceable in a bankruptcy context, this Court is not likely to have a subsequent opportunity to consider this issue if it arises in the Ninth Circuit.

A. The Third and Eleventh Circuits Reached Results That Are Diametrically Opposed To The Ruling Of The Ninth Circuit When Interpreting Section 541(c)(2)

The Ninth Circuit acknowledged in its opinion (App., *infra*, 17a) that two circuit courts, in addressing similar

laws, have found section 541(c)(2) applicable and have excluded various forms of retirement benefits. *See In re Yuhas*, 104 F.3d 612 (3d Cir. 1997) (exclusion under a New Jersey statute); *Meehan v. Wallace (In re Meehan)*, 102 F.3d 1209 (11th Cir. 1997) (exclusion under Georgia law). To discredit the two prior opinions, the panel asserts that *Yuhas* and *Meehan* misinterpreted the plain language of section 541(c)(2) of the Bankruptcy Code.

Ironically, both *Meehan* and *Yuhas* state that their rulings are based upon the plain language of the estate. *Yuhas*, 104 F.3d at 615; *Meehan*, 102 F.3d at 1211. The disagreement between the two sets of opinions, both purporting to be based upon the plain language of the Bankruptcy Code, is whether, as the Ninth Circuit panel suggests, the Bankruptcy Code imposes the requirement that the nonbankruptcy statute be designed to enforce an anti-alienation provision in the trust rather than an anti-alienation clause contained only in the statute.

The Third and Eleventh Circuit's rulings – that the restriction need not be in the instrument itself – are more consistent with a plain reading of the statute. Notably, there are no qualifiers following the term "restrictions" other than that the restriction somehow involves a beneficial interest in a trust. Thus, a plain reading of the provision does not support a limitation on the location of these restrictions – they can either be in the trust or in the applicable law. *See, e.g., In re Meehan*, 102 F.3d at 1211 n.5 ("The problem with the district court's construction is that it assumes that the phrase "in a trust" modifies the word "restriction." Rather, . . . the phrase "in a trust" modifies the immediately preceding phrase "beneficial interest of the debtor." With this more natural reading . . . , so that the phrase "in a trust" means only that

the statute is talking about a beneficial interest in a trust, the district court's implausible duplication disappears."). Because the Ninth Circuit opinion has failed to follow the plain language of the statute, the Third and Eleventh Circuit opinions are the better reasoned decisions cases.[7]

Regardless of the merits of any of the circuit decisions, the two different conclusions – one that state law is applicable to exclude certain assets from bankruptcy estates, the other that state law has no applicability – will lead to serious confusion in the lower courts and a lack of uniformity of interpretation of the same statutory language. The split between the circuits is substantial and warrants this Court's intervention.

B. The Ninth Circuit Erred When Failing To Engage In A Plain Reading Of Section 541(c)(2), And The Decision Raises An Important Question Regarding The Interpretation Of The Bankruptcy Code

The Supreme Court has consistently admonished lower courts to literally apply federal statutes like the Bankruptcy Code, except in those rare cases where the language will produce a result that is clearly at odds with Congress's intent in drafting the statute. *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242-43, 109 S. Ct. 1026, 103 L. Ed. 2d 290 (1989). One of the basic premises

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[7] In 1996, a Pennsylvania bankruptcy court that has specifically considered the applicability of section 8124, ruled that it is enforceable in bankruptcy cases. *In re Johnson*, 191 B.R. 75 (Bankr. M.D. Pa. 1996). In *Johnson*, the court held that the debtors' tax-deferred retirement annuity was not property of the estate even though it did not qualify under ERISA.

put forth by this Court is that where Congress attaches no qualifiers or modifiers to a phrase, courts should not place limitations on the statute's scope. *See Lewis v. United States*, 455 U.S. 55, 60, 100 S. Ct. 915, 63 L. Ed. 2d 791 (1980). Thus, the addition by judicial fiat of language to an unambiguous statute cannot be considered a natural reading of the statute.

In ruling that the Debtor's interest in the Pension Plan was not excluded from his chapter 11 bankruptcy estate, the Ninth Circuit corrupted the natural reading of section 541(c)(2) by incorporating language that Congress saw fit not to include. Section 541(c)(2) provides that

> [a] restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

11 U.S.C. § 541(c)(2). When parsing the language of the statute, it becomes obvious that there is no requirement that a transfer restriction be included in the trust document itself and that the state law be confined to the enforcement of that transfer restriction. To achieve the results the Ninth Circuit has suggested, one must superimpose the phrase "contained in the trust document" after the words "[a] restriction" and before the word "on". The panel's ruling therefore is hardly a "natural reading" of section 541.

Moreover, the ruling runs counter to the intent and spirit behind *Patterson v. Shumate*, 504 U.S. 753. In *Patterson*, the Court chose not to limit the scope of applicable non-bankruptcy law that excluded property from the reach of creditors in bankruptcy. In so ruling, the Court stated that courts are to give section 541(c)(2) its "literal"

meaning. *Id.* at 759. By imposing a limitation that is not expressly contained in section 541(c)(2), the Ninth Circuit has failed to adhere to the direction of *Patterson* when reading the statute. The panel's focus on less-than-relevant *dicta* in *Patterson* does not support the conclusion it reached in this case.

Finally, many of the goals and policies discussed, *supra*, regarding the exclusion of ERISA pension plans are also invoked when discussing the enforceability of the various state statutes at issue here. State legislatures have acted to protect all types of retirement benefits from the reach of creditors, but the Ninth Circuit has rewritten the Bankruptcy Code to short-circuit those state laws.[8] This Court should, therefore, resolve this important issue and correct the Ninth Circuit's error.

A Writ of Certiorari is necessary to eliminate one of two opposing interpretations of an important provision of the Bankruptcy Code that has now developed in three

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[8] Although the Ninth Circuit panel either failed to recognize it or deliberately ignored it, section 8124(b) does, in fact, meet the requirements imposed by the opinion. Section 8124(b)(1)(vii) is clearly written to enforce the Pension Plan's anti-alienation provision. In addition, the Pension Plan is enforceable under section 8124(b)(1)(ix), which excludes any pension that satisfies the requirements of 26 U.S.C. § 401(a). Section 401(a)(13), in turn, requires that to be tax-qualified, "the plan of which such trust is a part [must] provide[ ] that benefits provided under the plan may not be assigned or alienated". 26 U.S.C. § 401(a)(13)(A). There is no dispute that the Pension Plan contains an anti-alienation provision designed to meet the IRC's requirements. There is also no dispute that as late as 1993, the IRS has repeatedly ruled that the Pension Plan complied with the IRC. Thus, the Pennsylvania statute is designed to enforce the anti-alienation provision that is required of all tax-qualified plans.

circuit courts. Whichever interpretation is ultimately chosen, it will have a lasting impact on benefit plans under numerous non-bankruptcy laws when applied in bankruptcy cases. Thus, the issuance of a writ is not only necessary to eliminate inconsistent rulings by the Third, Ninth and Eleventh Circuits, but also to resolve a dispute over a critical provision of the Bankruptcy Code. It is an issue of first impression that has not, but should be, settled by this Court. Sup. Ct. R. 10.1(c).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL R. GRIFFINGER
Counsel of Record

JAMES N. LAWLOR
GIBBONS, DEL DEO, DOLAN,
GRIFFINGER & VECCHIONE
A Professional Corporation
One Riverfront Plaza
Newark, New Jersey 07102-5497
(973) 596-4500
Counsel for Petitioner

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: FRED LOWENSCHUSS, *DEBTOR.*	No. 98-15292 D.C. No. CV-96-00767-ECR
FRED LOWENSCHUSS, individually and in all capacities, *Appellant,* and LAURANCE LOWENSCHUSS, Trustee of the Fred Lowenschuss Associates Attorneys at Law Pension and Profit Sharing Plan, *Intervenor-Appellant,* v. BEVERLY SELNICK, *Appellee.*	OPINION

Appeal from the United States District Court
for the District of Nevada
Edward C. Reed, Jr., District Judge, Presiding

Argued and Submitted October 6, 1998
Submission Deferred October 9, 1998
Resubmitted March 10, 1999

Filed March 17, 1999

Before: Joseph T. Sneed, Cynthia Holcomb Hall, and
Pamela Ann Rymer, Circuit Judges.

Opinion by Judge Hall

COUNSEL

Robin L. Filion, Baker & McKenzie, San Francisco, California, for the appellant.

Michael R. Griffinger, Gibbons, Del Deo, Dolan, Griffinger, & Vecchione, Newark, New Jersey, for the intervenor-appellant.

Joseph S. Kistler, Gordon & Silver, Ltd., Las Vegas, Nevada, for the appellee.

OPINION

HALL, Circuit Judge:

Fred Lowenschuss ("Debtor") appeals from the district court's order affirming the bankruptcy court's November 1, 1996 order: (1) ruling that the Fred Lowenschuss & Associates at Law Pension Plan ("Pension Plan") was not ERISA qualified on the petition date, and was therefore not excluded from the bankruptcy estate under 11 U.S.C. § 541(c)(2); (2) ruling that Nevada law would be applied to determine whether Debtor's interest in the Pension Plan was exempt from the bankruptcy estate under 11 U.S.C. § 522; and (3) granting Beverly Selnick's ("Selnick") renewed motion for the appointment of a Chapter 11 Trustee. The Pension Plan Trustee intervened in this appeal. We have jurisdiction under 28 U.S.C. § 158(d), and we affirm.

BACKGROUND

On September 28, 1981, Selnick filed for divorce in the Pennsylvania courts. Almost ten years later, in July 1991, a Pennsylvania divorce court entered an order (the "Divorce Decree") for the equitable distribution of the marital property of Debtor and Selnick. The Divorce Decree awarded Selnick, inter alia, an ownership interest in 38.7% of the assets of the Pension Plan. However, instead of transferring to Selnick her share of the Pension Plan assets, Debtor transferred over $8 million in Pension Plan assets out of Pennsylvania to avoid the jurisdiction of the Pennsylvania courts. Debtor followed his assets out of Pennsylvania, relocating in Nevada where, on August 24, 1992, he filed a Chapter 11 bankruptcy petition.[1] On his bankruptcy petition, Debtor listed as excluded from the bankruptcy estate his beneficial interest in the Pension Plan as an ERISA qualified plan under 11 U.S.C. § 541(c)(2) and *Patterson v. Shumate*, 504 U.S. 753 (1992). In the alternative, Debtor claimed that his interest in the Pension Plan was exempt from the bankruptcy estate under 11 U.S.C. § 522.

In deciding the composition of Debtor's bankruptcy estate, the bankruptcy court determined that the Pension Plan was "ERISA qualified," and therefore excluded from the bankruptcy estate Debtor's beneficial interest in the Pension Plan (the "Exclusion Order"). Selnick appealed the Exclusion Order, but while that appeal was still pending, the bankruptcy court confirmed Debtor's plan of

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[1] On January 5, 1993, Debtor's bankruptcy was converted to Chapter 7. On February 12, 1993, Debtor's bankruptcy was reconverted to Chapter 11.

reorganization (the "Confirmation Order"). Selnick appealed the Confirmation Order.

On appeal, the district court vacated the Exclusion Order, and remanded the case to the bankruptcy court to hear additional testimony on the exclusion issue. Pending resolution of the exclusion issue, the district court stayed Selnick's appeal of the money judgment ruling and the Confirmation Order, and issued a related minute order declaring that the plan of reorganization could not be confirmed until the exclusion issue had been resolved. Debtor immediately appealed the district court's order, and the Ninth Circuit dismissed the appeal for lack of jurisdiction.

On remand, the bankruptcy court determined that the Pension Plan was not ERISA qualified, and that therefore Debtor's beneficial interest in the Pension Plan could not be excluded from Debtor's bankruptcy estate (the "Inclusion Order"). After concluding that Debtor's interest in the Pension Plan was included in the bankruptcy estate, the bankruptcy court determined that Nevada law would control the issue of whether Debtor's interest in the Pension Plan was exempt from the bankruptcy estate under 11 U.S.C. § 522 (the "Exemption Law Order").[2]

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[2] In a separate order that is not before us on appeal, the bankruptcy court determined that up to $100,000 of Debtor's beneficial interest in the Pension Plan was exempt from the bankruptcy estate under Nevada law. However, the bankruptcy court noted that Debtor admitted to receiving over $1,000,000 from the Pension Plan from the petition date through March 18, 1997, and that Debtor had therefore exhausted much more than the exemption could possibly permit. The district court concluded that Debtor was not entitled to any further

Finally, the bankruptcy court granted Selnick's motion for the appointment of a Chapter 11 Trustee for cause under 11 U.S.C. § 1104(a)(1), and for the best interests of the creditors under 11 U.S.C. § 1104(a)(2) (the "Trustee Order").

Debtor appealed the bankruptcy court's orders to the district court, and the district court affirmed all three orders. Debtor now appeals those orders to this Court. The Pension Plan Trustee has intervened in this appeal for the first time.

DISCUSSION

I. STANDING

Selnick contends that the Pension Plan Trustee lacks standing to intervene in this appeal. We disagree because the issues raised in this appeal implicate the status of the Pension Plan as an ERISA-qualified plan, and therefore directly affect the potential obligations and liabilities of the Pension Plan Trustee. Therefore, the Pension Plan Trustee has standing to intervene in this appeal. *Cf. In re Moses*, 215 B.R. 27, 34-35 (B.A.P. 9th Cir. 1997), *aff'd*, ___ F.3d ___, Nos. 98-55029, 98-55086, 1999 WL 27488 (9th Cir. Jan. 26, 1999).

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exemptions, and expressed its willingness to entertain a request for a return of the Pension Plan distributions received by Debtor that exceeded the allowable exemption.

II. MOOTNESS

Debtor and the Pension Plan Trustee contend that Selnick's appeal is moot because Selnick released all of her claims against Debtor by endorsing checks paid to her under the terms of the plan of reorganization. In addition, the Pension Plan Trustee contends that Selnick's appeal of the Exclusion Order is equitably moot because Selnick failed to obtain a stay pending her appeal of the Confirmation Order, and that principles of res judicata barred Selnick's initial challenge to the Exclusion Order. We disagree with each of these contentions.

A. Release

Debtor contends that this bankruptcy proceeding is moot, and the Pension Plan Trustee contends that the Inclusion Order must be reversed, because Selnick released any claims she held against Debtor and the Pension Plan when she negotiated checks bearing a restrictive endorsement.[3] We disagree because the bankruptcy court ordered that Selnick could negotiate the checks she received under the plan of reorganization, notwithstanding the restrictive endorsements.[4] For this

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[3] The restrictive endorsement stated, "Endorsement of this check constitutes a full release of all claims against Fred Lowenschuss, Laurance Lowenschuss, Edward Lowenschuss, Alan Lowenschuss & all claims against the Fred Lowenschuss Associates Pension Plan as set forth in the confirmed plan and order of the court in the reorganization case of Fred Lowenschuss # BNK92-31474."

[4] We also note that Debtor did not appeal the bankruptcy court's order allowing Selnick to negotiate the checks

reason, the Pension Plan Trustee's reliance on *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996), is misplaced. Therefore, Selnick's negotiation of the instruments bearing a restrictive endorsement could not have released her claims against Debtor, the Pension Plan, or any other party listed in the restrictive endorsements. Because Selnick did not release her claims, her appeal is not moot and the Inclusion Order does not need not be reversed.

B. Equitable Mootness

The Pension Plan Trustee contends that Selnick's failure to obtain a stay of the Confirmation Order pending her appeal of the Exclusion Order mooted her appeal of the Exclusion Order.[5] We disagree because this case does not present transactions that are so complex or difficult to unwind that the doctrine of equitable mootness would apply. *Compare In re Spirtos*, 992 F.2d 1004, 1007 (9th Cir. 1993) (finding appeal not moot when court could order debtor to return to estate postconfirmation distributions of pension plan assets), with *In re Roberts Farms, Inc.*, 652

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notwithstanding the restrictive endorsement, and he cannot now collaterally attack that order in this appeal. *See Sidney v. Zah*, 718 F.2d 1453, 1457-58 (9th Cir. 1983).

[5] We note that the district court rejected this same argument in 1994 when it denied Debtor's motion to dismiss on grounds of equitable mootness Selnick's appeal of the Exclusion Order. We also note that the Pension Plan Trustee mischaracterizes the record by stating that Selnick failed to pursue a stay of the Confirmation Order. Selnick moved for a stay of the Confirmation Order, but the bankruptcy court denied that motion, stating that Selnick's remedy was by way of appeal, which Selnick diligently pursued.

F.2d 793 (9th Cir. 1981) (finding appeal moot when attempt to change plan distributions would create an unmanageable and uncontrollable situation), and *In re Combined Metals Reduction Co.*, 557 F.2d 179 (9th Cir. 1977) (finding appeal moot when vacating plan would be ineffective to undo sales, leases, and options long ago consummated under plan). As in *Spirtos*, we could simply order Selnick to return to the bankruptcy estate those payments she received under the plan of reorganization. Because we are able to fashion effective relief for events that transpired as a result of the bankruptcy court's refusal to grant Selnick's request for a stay, Selnick's appeal is not equitably moot.[6] *See Spirtos*, 992 F.2d at 1006.

C. Res Judicata

The Pension Plan Trustee contends that Selnick's challenge to the Exclusion Order was barred by principles of res judicata because the Chapter 7 Trustee dismissed with prejudice a turnover action against the Pension Plan Trustee. We disagree. The turnover action involved a dispute between the Pension Plan Trustee and the Chapter 7 Trustee, while the challenge to the Exclusion Order involves a dispute between Debtor and Selnick. Because

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[6] The Pension Plan Trustee reasoned that, because Selnick's appeal was equitably moot, the Confirmation Order must be reinstated, and therefore the Inclusion Order must be reversed. However, because we hold that Selnick's appeal is not equitably moot, the Pension Plan Trustee's arguments that are based on mootness fail. *See also, In re Lowenschuss*, Nos. 96-17213, 97-16506 (9th Cir.) (affirming order vacating Confirmation Order).

the Pension Plan Trustee cannot demonstrate that the parties in the first action are "the same parties or their privies" as the parties in the current action, his res judicata argument fails. *See Montana v. United States*, 440 U.S. 147, 153 (1979); *Ross v. International Bhd. of Elec. Workers*, 634 F.2d 453, 457 (9th Cir. 1980).

In addition, even if the Pension Plan Trustee could establish the same parties requirement, res judicata would not help the Pension Plan Trustee's cause. The Chapter 7 Trustee did not have the authority to dismiss the turnover action because the Chapter 7 Trustee's authority to act in this bankruptcy proceeding terminated when the case was converted from Chapter 7 to Chapter 11, *see* 11 U.S.C. § 348(e), which occurred more than one year before the dismissal of the turnover action. Consequently, the Chapter 7 Trustee's dismissal of the turnover action had no legal effect on Selnick's ability to challenge the Exclusion Order.

III. EXCLUSION

Debtor contends that the bankruptcy court (1) lacked jurisdiction to reconsider the exclusion issue, and (2) erred by finding that Debtor's beneficial interest in the Pension Plan was not excluded from the bankruptcy estate under ERISA or Pennsylvania law. We disagree.

A. Jurisdiction

Debtor contends that the bankruptcy court lacked jurisdiction to reconsider the exclusion issue on remand because the Confirmation Order ousted the bankruptcy

court of jurisdiction to take any action inconsistent with the terms of the plan of reorganization. We find no merit in Debtor's argument because the district court effectively stayed the Confirmation Order pending resolution of the exclusion and exemption issues.[7] *Cf. In re Chinichian*, 784 F.2d 1440, 1444 (9th Cir. 1986). Therefore, the bankruptcy court had jurisdiction to consider the exclusion issue on remand.

B. ERISA

Debtor contends that the bankruptcy court erroneously determined that his beneficial interest in the Pension Plan was not excluded from the bankruptcy estate under 11 U.S.C. § 541(c)(2) and ERISA. The relevant inquiry in the bankruptcy context is whether, on the petition date, Debtor could have enforced under ERISA the Pension Plan's transfer restriction. *See* 11 U.S.C. § 541(a)(1), (c)(2); *Patterson*, 504 U.S. at 757-58. We find that on the petition date Debtor could not have enforced the Pension Plan's transfer restriction under ERISA.

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[7] In addition, we have already held in a related appeal that the bankruptcy court erroneously confirmed the plan of reorganization because the plan purported to release claims against third-party nondebtors. *See In re Lowenschuss*, 67 F.3d 1394, 1401 (9th Cir. 1995). In that appeal, we stated that the Bankruptcy Code "precludes bankruptcy courts from discharging the liabilities of non-debtors," *see* 11 U.S.C. § 524(c), and that a "bankruptcy court lacks the power to confirm plans of reorganization which do not comply with applicable provisions of the Bankruptcy Code." *Id.* Because Debtor's plan did not comply with 11 U.S.C. § 524(c), it could not have been confirmed.

ERISA does not cover a pension plan of which the only beneficiary is the sole owner of the company funding the plan. *See* 29 U.S.C. § 1003(a) (declaring that ERISA applies to "employee" benefit plans); 29 C.F.R. § 2510.3-3(b), (c)(1) (excluding from ERISA plans without "employee" participants; excluding from definition of "employee" sole owner of company sponsoring plan); *In re Watson*, 161 F.3d 593, 596-99 (9th Cir. 1998). Because on the petition date Debtor was both the sole beneficiary of the Pension Plan and the sole owner of the company funding the Pension Plan, the Pension Plan was not covered by ERISA on that date. Therefore, on the petition date, Debtor would have been unable to enforce the Pension Plan's transfer restriction under ERISA because the Pension Plan was not ERISA qualified. *See Watson*, 161 F.3d at 596 ("ERISA-qualified plans must have employee participants. . . . "); *Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262, 264 (9th Cir. 1991) ("[A] plan whose sole beneficiaries are the company's owners cannot qualify as a plan under ERISA."). Because the Pension Plan's transfer restriction was unenforceable under ERISA on the petition date, Debtor's beneficial interest in the Pension Plan could not have been excluded from the bankruptcy estate under 11 U.S.C. § 541(c)(2) using ERISA as the applicable nonbankruptcy law.

Debtor contends that once the Pension Plan was established or maintained under ERISA, the Pension Plan could not lose its ERISA status merely by the attrition of all participants in the Pension Plan except for Debtor. Instead, Debtor argues that the Pension Plan could lose

its ERISA status only if it was terminated pursuant to ERISA.[8] We disagree.

ERISA was "designed to ensure the proper administration of pension and welfare plans," and "to protect plan participants and beneficiaries." *See* 29 U.S.C. § 1001; *Boggs v. Boggs*, 520 U.S. 833, 839, 845 (1997). These protections were enacted "to remedy abuses by employers who manage pension plan assets held in trust for workers in traditional employer-employee relationships." *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142 (1985); *accord Watson*, 161 F.3d at 598. In *Watson*, we noted that self-employed owners of companies that sponsor pension plans were deliberately excluded from ERISA's protections because these individuals can protect their own beneficial interests in the plans. *Watson*, 161 F.3d at 598. In this case, Debtor was at all times the sole owner of Fred Lowenschuss & Associates, the sponsor of the Pension Plan.[9] In addition, for a period of at least seven years

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[8] Debtor mischaracterizes the issue presented for review as the termination of an ERISA plan. However, we are merely confronted with the question of whether, on the petition date, Debtor could enforce under ERISA the transfer restriction contained in the Pension Plan. We have answered that question in the negative. Although 29 U.S.C. § 1341 is the exclusive means by which an ERISA plan may be terminated, that statute does not apply to non-ERISA plans such as Debtor's. Therefore, Debtor's argument that an ERISA plan may be terminated only pursuant to ERISA is inapposite.

[9] For this reason, Debtor's reliance on *Patterson*, 504 U.S. 753 and *In re Baker*, 114 F.3d 636 (7th Cir. 1997) is misplaced. In both *Patterson* and *Baker*, the debtors were not the sole owners of the companies sponsoring the pension plans, and therefore qualified as employee-participants in the pension plans.

prior to the petition date, Debtor was the sole beneficiary of the Pension Plan. There were no ERISA "employees" or "participants" in the Pension Plan during this period. Finally, Debtor maintained complete control over the Pension Plan during this period, and had the power to terminate the Pension Plan and distribute the proceeds to himself. Therefore, Debtor did not need the protections of ERISA to protect himself from the Pension Plan's administrator because Debtor was the administrator.

ERISA was not designed as a means for Debtor, who happens to be simultaneously the "trustee, administrator, sponsor, and sole beneficiary of the Pension Plan," to exclude his interest in the Pension Plan from creditors of the bankruptcy estate. The Bankruptcy Code merely allows a transfer restriction that is enforceable outside of bankruptcy to be enforced within bankruptcy. Because Debtor could not have enforced the transfer restriction in the Pension Plan under ERISA outside of bankruptcy, he cannot now enforce it under 11 U.S.C. § 541(c)(2). Section 541(c)(2) does not make enforceable what is otherwise unenforceable.

Debtor next contends that the Department of Labor regulations are invalid to the extent those regulations exclude from the definition of an ERISA "employee" any individual who is the sole owner of the company sponsoring the pension plan. *See* 29 C.F.R. § 2510.3-3. We recently rejected this same argument in *Watson*, *see* 161 F.3d at 596-99, and therefore find it to be without merit.

Debtor and the Pension Plan Trustee contend that the district court clearly erred by finding that there were no employee-participants in the Pension Plan because at least

one of Debtor's sons was an employee-participant of the Pension Plan during the relevant plan year. However, after reviewing the record, we find that the district court did not clearly err because neither of Debtor's sons could have qualified as an employee-participant in the Pension Plan on the petition date. The district court found that no contributions were made to the Pension Plan on behalf of Debtor's sons until December 1992, approximately four months after the petition date. *See* 29 C.F.R. § 2510.3-3(d)(1)(ii)(A) (employee becomes participant of pension plan on date that contribution is made on his behalf). In addition, the district court found that there was no documentary evidence to show that Debtor's sons had worked the 1000 hours per year minimum required for participation in the Pension Plan. *See id.* (employee becomes participant of pension plan on date that minimum number of hours worked). Therefore, Debtor's sons could not have been employee-participants in the Pension Plan on the petition date.[10]

Debtor also contends that his sons were former employees of Fred Lowenschuss & Associates who had a reasonable expectation of returning to covered employment with Fred Lowenschuss & Associates, and were therefore participants in the *Pension Plan under Curtis v. Nevada Bonding Corp.*, 53 F.3d 1023, 1027 (9th Cir. 1995).

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[10] We also note that neither of Debtor's sons would have qualified as participants in the Pension Plan at any time between December 1, 1991 and November 30, 1992, the plan year in which Debtor filed his petition in bankruptcy. No contributions were made to the Pension Plan on behalf of Debtor's sons before December 1992, and neither of Debtor's sons worked the minimum number of hours required for participant status during that plan year.

We disagree because in order for Debtor's sons to have had a reasonable expectation of returning to covered employment, Debtor's sons must have been covered employees before leaving that employment. *Cf. McBride v. PLM Int'l, Inc.*, 153 F.3d 972, 976 (9th Cir. 1998) (denying participant status to former employee who had been covered by ERISA plan did not have reasonable expectation of returning to covered employment when plan had been terminated); *Kuntz v. Reese*, 785 F.2d 1410, 1411 (9th Cir. 1986) (denying participant status to former employees who had already received full distribution of vested plan benefits and who had not alleged plan "to start accruing benefits once again under the pension plan"). Because neither of Debtor's sons was covered by the Pension Plan prior to or on the petition date, neither of Debtor's sons could have had a reasonable expectation of returning to covered employment after the petition date. Therefore, neither of Debtor's sons was a participant in the Pension Plan under *Curtis*.

C. Pennsylvania Law

The Pension Plan Trustee contends that the bankruptcy court erred by not excluding Debtor's beneficial interest in the Pension Plan from the bankruptcy estate under Pennsylvania law.[11] We disagree.

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[11] Although Debtor makes a similar argument, he failed to raise this argument in the bankruptcy court and failed to demonstrate exceptional circumstances for failing to raise this argument below. We therefore decline to address Debtor's argument for the first time on appeal. *See International Union of Bricklayers v. Martin Jaska, Inc.*, 752 F.2d 1401, 1404 (9th Cir. 1985).

In *Patterson v. Shumate*, 504 U.S. 753 (1992), the Supreme Court stated, "The natural reading of the provision [11 U.S.C. § 541(c)(2)] entitles a debtor to exclude from property of the estate any interest in a plan or trust that contains a transfer restriction enforceable under any relevant nonbankruptcy law." *See id.* at 758. Thus, in order for Debtor's beneficial interest in the Pension Plan to be excluded from the bankruptcy estate under Pennsylvania law, two conditions must be satisfied: (1) the Pension Plan must contain a transfer restriction, and (2) that transfer restriction must be enforceable under Pennsylvania law. Although the Pension Plan contains a transfer restriction, that transfer restriction is not enforceable under Pennsylvania law.

The Pension Plan cannot qualify as a valid Pennsylvania spendthrift trust because at all times relevant to this appeal Debtor was the settlor, administrator, and sole beneficiary of the Pension Plan, exercised control over the Pension Plan, and had the power to terminate the Pension Plan and distribute the proceeds to himself. Therefore, Debtor's interest in the Pension Plan cannot be excluded from the bankruptcy estate under Pennsylvania spendthrift trust law. *See CIT Corp. v. Flint*, 5 A.2d 126 (Pa. 1939).

In addition, Debtor's interest in the Pension Plan cannot be excluded under section 8124(b) of the Pennsylvania Consolidated Statutes[12] because that exemption

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[12] Section 8124(b) exempts "from attachment or execution on any judgment . . . [a]ny retirement or annuity fund provided for under section 401(a), 403(a) and (b), 408 or 409 of the Internal Revenue Code . . . , the appreciation thereon, the income

statute does not allow Debtor to enforce the Pension Plan's transfer restriction as *Patterson* requires. In *Patterson*, the Supreme Court held that the transfer restriction required in every ERISA plan was enforceable because ERISA-plan participants or beneficiaries could enforce that transfer restriction through ERISA's civil remedies. *See* 504 U.S. at 760 (citing 11 U.S.C. § 1132(a)(3), (5)). In contrast, section 8124(b) does not provide a mechanism by which Debtor can enforce the transfer restriction contained in the Pension Plan. In fact, the section 8124(b) exemption operates without regard to a transfer restriction that may be contained in the trust instrument. Therefore, Debtor's interest in the Pension Plan cannot be excluded from the bankruptcy estate under section 8124(b).

We recognize that our decision creates a split among the circuits that have addressed the issue of whether the "restriction" to which 11 U.S.C. § 541(c)(2) refers must be contained within the trust instrument. Both the Third and Eleventh Circuits, the only other circuits to have considered this question, have decided that the restriction need not be contained in the trust instrument. *See In re Yuhas*, 104 F.3d 612 (3d Cir. 1997) (finding section 25:2-1(b) of the New Jersey Statutes Annotated constitutes restriction on transfer of debtor's interest in IRA that is enforceable under applicable nonbankruptcy law); *In re Meehan*, 102

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therefrom and the benefits or annuity payable thereunder." 42 Pa. Cons. Stat. § 8124(b)(1)(ix). However, section 8124(b) does not allow exemption of (1) contributions made within one year of the petition date, (2) contributions in excess of $15,000 made within a one-year period, and (3) fraudulent conveyances. *See id.* § 8124(b)(1)(ix)(A)-(C).

F.3d 1209 (11th Cir. 1997) (finding section 18-4-22(a) of the Official Code of Georgia Annotated constitutes restriction on transfer of debtor's interest in IRA that is enforceable under applicable nonbankruptcy law); *see also In re Johnson*, 191 B.R. 75 (Bankr. M.D. Pa. 1996). The *Yuhas* court reasoned that "[i]n *Patterson*, the Court said that a debtor may exclude a trust from the bankruptcy estate if the trust contains an appropriate restriction; the court did not say that a debtor may exclude a trust *only* if it, as opposed to a statute, contains such a restriction." 104 F.3d at 616 n.3. Similarly, the *Meehan* court reasoned that "[n]othing in the language of [11 U.S.C. § 541(c)(2)] suggests that the restriction must be contained both within a relevant nonbankruptcy statute and also within the trust instrument itself." 102 F.3d at 1211. We disagree.

We believe that the Supreme Court's statement in *Patterson* limited 11 U.S.C. § 541(c)(2) to its "natural reading" – a debtor's interest in a trust may be excluded from the bankruptcy estate only if the trust contains a transfer restriction, and that restriction is enforceable under applicable nonbankruptcy law. *See* 504 U.S. at 758; *cf. In re Baker*, 114 F.3d 636, 638 (7th Cir. 1998) ("[Section 541(c)(2)] keeps out of the estate (and therefore out of creditors' hands) property in which the debtor owns the trust's beneficial interest, but subject to a spendthrift clause or some equivalent that prevents the debtor from converting a stream of future payments into a capital sum for current consumption."); S. Rep. No. 95-989, at 83 (1978) ("[11 U.S.C. § 541(c)(2)] preserves restrictions on a transfer of a spendthrift trust. . . . "); H.R. Rep. No. 95-595, at 369 (1977) ("[11 U.S.C. § 541(c)(2)] preserves restrictions on transfer of a spendthrift trust to the extent that the

restriction is enforceable under applicable nonbankruptcy law.").

We agree with the bankruptcy court in *In re Zott*, 225 B.R. 160 (Bankr. E.D. Mich. 1998), that "to accept the premise espoused in *Meehan*, that a transfer restriction within a state statute is sufficient to meet the requirements of § 541(c)(2), would render the language 'enforceable under nonbankruptcy law' nugatory and meaningless surplussage because a state statute (nonbankruptcy law) is obviously enforceable under state law (nonbankruptcy law)." *Id.* at 165. Therefore, we find that the language in the statute lends itself to the Supreme Court's "natural reading" of 11 U.S.C. § 541(c)(2) because the redundancy created by the Third and Eleventh Circuits' holdings should be avoided under general principles of statutory construction. *See Kungys v. United States*, 485 U.S. 759, 778 (1988); *United States v. Smith*, 155 F.3d 1051, 1058 (9th Cir. 1998), *cert. denied*, 119 S.Ct. 804 (1999).

In addition, we do not subscribe to the Eleventh Circuit's view that under our result the restriction "must be contained both within a relevant nonbankruptcy statute and also within the trust instrument itself." *See* 102 F.3d at 1211. Instead, we view our decision as requiring only that the trust instrument contain the restriction, and that the applicable federal or state law provides a means to enforce that restriction. *See Patterson*, 504 U.S. at 758, *Zott*, 225 B.R. at 163-65. Only if the transfer restriction contained in the trust instrument is enforceable under applicable nonbankruptcy law can the debtor's beneficial interest in that trust be excluded from the bankruptcy estate. *See* 11 U.S.C. § 541(c)(2); *Patterson*, 504 U.S. at 758, 760. Because a debtor must be able to enforce the transfer

restriction contained in a trust instrument under applicable nonbankruptcy law, and because section 8124(b) does not provide a means to enforce a transfer restriction contained in a trust, section 8124(b) cannot operate to exclude from the bankruptcy estate Debtor's interest in the Pension Plan.[13]

IV. EXEMPTION

Debtor contends that the bankruptcy court erred by concluding that Debtor was domiciled in Nevada for the majority of the 180-day period preceding the petition date, and therefore erred by applying Nevada law to determine whether Debtor's beneficial interest in the Pension Plan was exempt from the bankruptcy estate under 11 U.S.C. § 522(b).[14] We will reverse the bankruptcy court's finding that Debtor was domiciled in Nevada only if that finding

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[13] We note that our decision today does not impose on bankruptcy debtors an unnecessary hardship because state exemption laws such as section 8124(b) that do not allow debtors to enforce the transfer restrictions contained in trusts, and therefore do not allow debtors to exclude from the bankruptcy estate their interests in those trusts, can be invoked pursuant to 11 U.S.C. § 522(b)(2) to exempt from the bankruptcy estate debtors' interests in trusts that otherwise satisfy those state laws.

[14] The Bankruptcy Code allows a debtor to "exempt from property of the estate . . . any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition at the place in which debtor's domicile has been located for the 180 days immediately preceding the date of the filing of the petition, or for a longer portion of such 180-day period than in any other place." 11 U.S.C. § 522(b)(2)(A).

was clearly erroneous. *See Lew v. Moss*, 797 F.2d 747, 751 (9th Cir. 1986). The bankruptcy court did not err.

Debtor was domiciled in Nevada for purposes of 11 U.S.C. § 522(b) if (1) Debtor was physically present in Nevada for the greater part of the 180-day period preceding the petition date, and (2) Debtor intended to remain in Nevada indefinitely. *See Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48 (1989); *Lew*, 797 F.2d at 752. The record shows that Debtor satisfied both the physical presence and intent requirements for domicile in Nevada.

First, the record shows that Debtor was physically present in Nevada for the majority of the 180-day period leading up to the petition date. Debtor admitted that he had been at his Nevada residence for four months prior to the petition date. In addition, Debtor admitted that he was a Nevada resident for over ninety days of the 180-day period preceding the petition date.

Second, the record shows that Debtor intended to remain in Nevada indefinitely. Debtor stated in a creditors meeting that he no longer had a residence in Pennsylvania, and that he intended to reside in Nevada for the indefinite future. In addition, when Debtor fled Pennsylvania for Nevada, he transferred out of Pennsylvania all of the assets of the Pension Plan, which was Debtor's sole source of income at the time. Debtor admitted that his decision to leave Pennsylvania was influenced by the outstanding bench and contempt warrants issued against him by the Pennsylvania courts as a result of his failure to appear in the divorce and distribution proceedings. Finally, Debtor testified that he left Pennsylvania to get a

new start and to go on with his life, suggesting that he did not intend to return to Pennsylvania when he relocated to Nevada.

Because the bankruptcy court's finding that Debtor was domiciled in Nevada on the petition date is supported by the evidence, that finding was not clearly erroneous. *See Duckett v. Godinez*, 109 F.3d 533, 535 (9th Cir.), *cert. denied*, 118 S.Ct. 135 (1997). Therefore, the bankruptcy court correctly determined that Nevada law would be applied to determine whether Debtor's beneficial interest in the Pension Plan was exempt from the bankruptcy estate under 11 U.S.C. § 522(b).

V. CHAPTER 11 TRUSTEE

Debtor contends that the bankruptcy court erred by granting Selnick's motion to appoint a Chapter 11 Trustee. We will reverse the bankruptcy court's decision to grant Selnick's motion to appoint a Chapter 11 Trustee only if the bankruptcy court abused it discretion. *See In re Marvel Entertainment Group Inc.*, 140 F.3d 463, 470 (3d Cir. 1998); *Committee of Dalkon Shield Claimants v. A.H. Robins Co.*, 828 F.2d 239, 242 (4th Cir. 1987); *Kimm v. Cox*, 130 F.2d 721, 733 (8th Cir. 1942); *cf. In re F.P. Newport Corp.*, 93 F.2d 630, 634 (9th Cir. 1937). Upon a careful review of the record, we find that the bankruptcy court did not abuse its discretion in granting Selnick's motion for the appointment of a Chapter 11 Trustee.

Under the Bankruptcy Code, "[a]t any time after the commencement of the case but before confirmation of a plan, on request of a party in interest . . . and after notice and a hearing, the court shall order the appointment of a

trustee – (1) for cause . . . ; or (2) if such appointment is in the best interests of creditors." *See* 11 U.S.C. § 1104(a). The bankruptcy court granted Selnick's motion for the appointment of a trustee for cause under 11 U.S.C. § 1104(a)(1) and in the best interests of creditors under 11 U.S.C. § 1104(a)(2). Either one of these two, independent grounds was sufficient to justify granting Selnick's motion.

First, Debtor's prepetition transfer of the Pension Plan assets out of Pennsylvania, his personal flight to Nevada to avoid the jurisdiction of the Pennsylvania courts, and Debtor's control over the Pension Plan assets were good cause to appoint a trustee. Second, Debtor's history of manipulating the Pension Plan and his control over the Pension Plan's nominal trustee, Debtor's son, support the bankruptcy court's finding that it would be in the best interests of the creditors to have an independent and disinterested trustee to administer the estate and to pursue Debtor's unauthorized transfers of property. Therefore, the bankruptcy court did not abuse its discretion in granting Selnick's motion to appoint a Chapter 11 Trustee.

Debtor contends that the bankruptcy court lacked jurisdiction to grant Selnick's motion because Debtor's plan of reorganization had been confirmed. We disagree because, as we stated above, the district court effectively stayed the Confirmation Order pending resolution of the exclusion and exemption issues. Therefore, the bankruptcy court had jurisdiction to grant Selnick's motion under 11 U.S.C. § 1104(a). For the same reason, we also reject Debtor's arguments that (1) the Bankruptcy Code prohibits the postconfirmation appointment of a trustee,

and (2) that the Confirmation Order, under the law of the case doctrine, implicitly determined that a Chapter 11 Trustee was not necessary. The Confirmation Order had neither one of these effects on the bankruptcy proceedings once the district court correctly determined that the plan could not be confirmed without first resolving the exclusion and exemption issues.

Debtor also contends that the bankruptcy court's order appointing the Chapter 11 Trustee was invalid because Debtor received insufficient notice and a hearing as required by the Bankruptcy Code. We disagree because the bankruptcy court complied with the notice and hearing requirements prescribed by the Code. Under the Bankruptcy Code, the bankruptcy court may take actions without an actual hearing if (1) a party receives notice of the proposed action, and (2) a hearing "is not requested timely by a party in interest." *See* 11 U.S.C. § 102(1)(B). The record shows that Debtor received notice of Selnick's motion. In fact, Debtor filed an opposition to that motion. However, Debtor never requested a hearing on that motion. Therefore, Debtor's argument that he was deprived of notice and a hearing is without merit.

CONCLUSION

Based on the foregoing, the district court's order affirming in its entirety the bankruptcy court's November 1, 1996 order is affirmed, and the case is remanded to the bankruptcy court for further proceedings consistent with this opinion.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: FRED LOWENSCHUSS, Debtor.	No. 98-15292
FRED LOWENSCHUSS, Appellant, vs. BEVERLY SELNICK, Appellee.	DC# CV-96-00767-ECR Nevada (Reno) ORDER (Filed Apr. 17, 1998)

Before: Peter L. Shaw, Appellate Commissioner

Laurance Lowenschuss' motion to intervene in this appeal as an appellant is granted. The Clerk shall amend the docket to reflect that Laurance Lowenschuss, trustee of the Fred Lowenschuss Pension Plan, is an appellant in this appeal. This order shall be served on counsel for intervenor-appellant.

Upon review of the parties' responses to this court's March 11, 1998 order to show cause, the order to show cause is hereby discharged and the appeal shall proceed. Briefing shall proceed as follows: appellants' opening brief is due May 22, 1998; appellee's answering brief is due June 22, 1998; and appellants' optional reply brief is due 14 days from service of the answering brief.

/s/ Peter L. Shaw
General Order 6.3(e)

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

(Filed Jan. 29, 1998)

In re FRED LOWENSCHUSS,

Debtor.

_____/

FRED LOWENSCHUSS,

Appellant,

v.

BEVERLY SELNICK,

Appellee.

_____/

CV-N-96-767-ECR

ORDER

Debtor Fred Lowenschuss has appealed the Bankruptcy Court's November 1, 1996 Order ("Order") determining, among other things, that ERISA does not exclude Mr. Lowenschuss's pension plan from his bankruptcy estate. We AFFIRM.

BACKGROUND

The present adversary proceeding is part of Mr. Lowenschuss' ongoing crusade to stymie his ex-wife Beverly Selnick's attempts to collect the debt he owes her. The procedural history of this crusade, so reminiscent of Charles Dickens' *Jarndyce v. Jarndyce*, is spelled out in detail in the Order, published at *In re Lowenschuss*, 202 B.R. 305 (Bankr.D.Nev. 1996), and we summarize it here.

A Pennsylvania court issued a divorce decree between Fred Lowenschuss and Beverly Selnick in July

1991, after almost ten years of litigation. The decree called for a roughly 50/50 split of the couple's assets, which meant that Ms. Selnick was to receive about $5 million, including slightly more than $3 million from Mr. Lowenschuss' pension plan ("the Plan"). Mr. Lowenschuss immediately began frustrating Ms. Selnick's attempts to enforce the divorce decree.

In particular, he moved to Nevada and filed for Chapter 11 bankruptcy in August 1992. In July 1993 the Bankruptcy Court determined that the Plan was excluded from the bankruptcy estate under ERISA. *See* August 19, 1994 Order (#45, Appendix at 143-57). In October 1993 the Bankruptcy Court confirmed Mr. Lowenschuss' plan of reorganization. Ms. Selnick appealed both the exclusion order and the plan confirmation. This Court appealed both the exclusion order and the plan confirmation. This Court reversed the exclusion order and remanded for further proceedings, and stayed the appeal of the plan confirmation pending resolution of the exclusion issue. *Id.* at 97, 143-57.

On November 1, 1996 the Bankruptcy Court on remand 1) held that Mr. Lowenschuss' interest in his pension plan is part of the estate in bankruptcy, 2) appointed a Chapter 11 Trustee, and 3) set a time for an evidentiary hearing to determine exemptions under Nevada law. *Lowenschuss*, 202 B.R. 305. On July 1, 1997, having lifted the stay of the appeal of the reorganization plan confirmation, this Court vacated that plan confirmation. Order (#45, Appendix at 105-16). In the meantime Mr. Lowenschuss appealed the November 1, 1996 Order, which appeal is now ripe. Opening Br. (#39); Appellee Br. (#45); Reply Br. (#48).

DISCUSSION

The parties do not dispute that the Order is a final judgment of the Bankruptcy Court and that we therefore have jurisdiction over this appeal, 28 U.S.C. § 158(a)(1). Appellee does not dispute that we review findings of fact for clear error and conclusions of law de novo, Fed.R.Bank.P. 8013; *In re Lazar*, 83 F.3d 306, 308 (9th Cir. 1996). Issues not raised before the Bankruptcy Court should generally not be considered by the District Court sitting in appeal. *Lin v. Ehrle (In re Ehrle)*, 189 B.R. 771, 776 (9th Cir. B.A.P. 1995); *Palmer v. I.R.S.*, 116 F.3d 1309, 1313 (9th Cir. 1997). We address the issues presented one by one.

I. The Plan Has Only a Single Participant

Appellee argues that the Plan had more than one participant, thus making it "ERISA-qualified" and excluding it from the bankruptcy estate, and that the Bankruptcy Court's factual finding to the contrary is clearly erroneous. Opening Br. at 16-21 (#39). We find no error in the Bankruptcy Court's holding.

First, the Bankruptcy Court articulated six illustrative facts supporting its conclusion. *Lowenschuss*, 202 B.R. at 314. Although Appellant disputes each of the six facts, he has not shown clear error. For example, the Court noted that 1) the Plan's annual reports from 1985 to 1990 indicated that Fred Lowenschuss was the Plan's sole participant, 2) the testimony of Fred Lowenschuss and his accountant at the divorce trial indicated that Mr. Lowenschuss was the Plan's sole participant, and 3) the documentary evidence to the contrary had been created at Mr.

Lowenschuss' direction after the filing of the Bankruptcy petition. *Id.* Appellant explains these facts by asserting that he and his accountant were mistaken about the status of the Plan at the time of their testimony and the time they prepared the documentary evidence; an equally reasonable explanation is the one provided by the Bankruptcy Court: Mr. Lowenschuss, upon discovering in 1992 that an ERISA-qualified pension plan is exempt under bankruptcy law, quickly changed his story. As another example, the Court observed that the evidence supporting the assertion that Mr. Lowenschuss' sons were Plan participants was weak, since the documentary evidence that they worked for him was shaky, the documentary evidence that contributions to the Plan on their behalf was nonexistent, and his son Edward's testimony on the subject was not credible because he, too, changed his story after Fred Lowenschuss filed for bankruptcy. *Id.* Appellant offers evidence rebutting these observations which, though weighing in Appellant's favor, falls far short of establishing clear error.

Second, the Bankruptcy Court on remand heard more evidence than it did originally, as this Court directed it to; this explains why the Bankruptcy Court's holding changed on remand. *Id.* at 306. We have every reason to expect that a particular factual finding might change when new evidence is considered, and even so predicted in our August 19, 1994 Order. Order at 13 (#45, Appendix at 155). Third, the Bankruptcy Court on remand apparently placed the burden of proving exclusion on Mr. Lowenschuss, rather than on Ms. Selnick, as it did originally. *Compare Lowenschuss*, 202 B.R. at 314 *with* Transcript at 156 (#40, Appendix at 123); Appellee Br. at 7 (#45).

Appellant does not challenge this conclusion of law, and in any event we think it correct. *In re Switzer*, 146 B.R. 1 (Bankr.C.D.Cal. 1992). In short, the Bankruptcy Court's factual finding that the Plan was a single participant plan is not clearly erroneous.

II. Whether The Plan is Nonetheless ERISA-Qualified

Mr. Lowenschuss does not dispute the legal conclusion that a plan with a single participant at the time the bankruptcy petition is filed is not ERISA-qualified, and is therefore not excluded from the estate in bankruptcy. *Lowenschuss*, 202 B.R. at 313 (citing *In re Watson*, 192 B.R. 238, 242 (Bankr.D.Nev. 1996)). Instead Mr. Lowenschuss argues that the Plan is ERISA-qualified notwithstanding its single participant status in August 1992, and therefore excludable from the bankruptcy estate pursuant to 11 U.S.C. § 541(c)(2). *See Patterson v. Shumate*, 504 U.S. 753, 760 (1992) (ERISA-based alienation restrictions permit exclusion under Section 541(c)(2)). More specifically, his point appears to be 1) that the Plan was formerly a multi-participant plan, 2) that a multi-participant plan, once ERISA-qualified, remains ERISA-qualified even after it becomes a single participant plan, 3) that Mr. Lowenschuss' Plan thus remains ERISA-qualified, and therefore 4) that as an ERISA-qualified plan it is excluded from the bankruptcy estate.

Resolution of this issue requires a determination that propositions 1) (the Plan was formerly multi-participant) and 2) (once ERISA-qualified, always ERISA-qualified) are correct. As we read the record, neither proposition was presented to the Bankruptcy Court. Because there

has been no change in the law, the issue is not purely one of law (because proposition 1) requires factual inquiry), and there are no exceptional circumstances, we should not hear the argument. *In re Ehrle*, 189 B.R. at 776. We therefore do not reach this issue.

III. Appointing a Chapter 11 Trustee Was Proper

On Ms. Selnick's motion, the Bankruptcy Court appointed a Chapter 11 Trustee, and made specific factual and legal findings in support thereof. *Lowenschuss*, 202 B.R. at 316. Although we have some doubt that this is a final order, it seems we have jurisdiction. *In re Bibo, Inc.*, 76 F.3d 256, 257 (9th Cir. 1996).

Mr. Lowenschuss challenges the Trustee's appointment on three grounds, each of which we reject. First, he argues that because the plan of reorganization had been confirmed, appointment of a trustee was untimely. 11 U.S.C. § 1104(a) (trustee may be appointed after commencement of the cause but before confirmation of a plan). Although not directly on point, we think *In re Bibo* rejects this argument. 76 F.3d at 258. Specifically, in *Bibo* the Nine Circuit held that 11 U.S.C. § 105(a), which permits a bankruptcy court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of" the bankruptcy code, even sua sponte, in order to "enforce or implement court orders or rules, or to prevent an abuse of process," trumps the more specific mandates of 11 U.S.C. § 1104(a). *Id.* By analogy, if the Bankruptcy Court here had authority to appoint a trustee sua sponte to enforce or implement court orders, then it had authority to do so on a party's motion even

after the reorganization plan was confirmed. Furthermore, even if it did not, any error was harmless – we vacated the confirmation by Order dated July 1, 1997. Order (#45, Appendix at 105-16).

Second, Appellant argues that he received neither notice nor hearing regarding the proposed appointment, in violation of his due process rights. Such a "theory of due process is wacky, sanctionably so," as even a cursory review of the record reveals. *Szabo Food Service, Inc. v. Canteen Corp.*, 823 F.2d 1073, 1080 (7th Cir. 1987) (Easterbrook, J.); Appellee Br. at 18-19 (#45). Third, Appellant argues that because the Bankruptcy Court confirmed the plan of reorganization in 1993 without appointing a trustee, by necessary implication it found that a trustee was inappropriate, and appointment one on remand in 1996 violated the law of the case doctrine. Assuming the law of the case doctrine is even applicable, it is clear that the doctrine did not preclude the Bankruptcy Court from appointing a trustee, since an exception plainly applies here: "the evidence on remand [was] substantially different." *U.S. v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997). The appointment of the Trustee was proper.

IV. The Present Appeal is Not Equitably Moot

Appellant argues that this appeal is "equitably moot" because Ms. Selnick did not seek a stay of the confirmation of the reorganization plan, the confirmation plan has been substantially consummated, and third parties have relied on the reorganization plan to their detriment. As noted, though, the confirmation was vacated. July 1, 1997

Order (#45, Appendix at 105-16). There is no reorganization plan in effect, and this appeal is therefore not moot.

V. Whether Ms. Selnick Released Her Interest in the Pension Plan

Appellant argues that by endorsing some 36 checks paid to her out of the Plan, Ms. Selnick has released any interest she might have in the Plan. The record indicates that this question was not before the Bankruptcy Court with regard to its November 1, 1996 Order, but had instead been the subject of an earlier proceeding (which Appellant apparently did not appeal). Appellee Br. at 21 (#45); July 5, 1995 Order (#45, Appendix at 64-65B). Because there has been no change in the law, the issue is not purely one of law (because analysis of release, accord, and satisfaction requires factual inquiry), and there are no exceptional circumstances, we should not hear the argument. *In re Ehrle*, 189 B.R. at 776. We therefore do not reach this issue.

VI. Nevada Law Applies Under Section 522(b)(2)(A)

Appellant raises a number of other arguments: 1) Pennsylvania law, rather than Nevada law, should apply when resolving state law issues, 2) the Plan's transfer restriction is enforceable under Pennsylvania law, 3) that Mr. Lowenschuss resides in Nevada is of no legal effect, 4) because the Plan contains a transfer restriction valid under Pennsylvania law, it is excludable from the bankruptcy estate under 11 U.S.C. § 541(c)(2) notwithstanding ERISA, and 5) under Pennsylvania law (as incorporated

by 11 U.S.C. § 522(b)(2)(A)) the Plan is exempt. Opening Br. at 29-37 (#39). The only one of these questions properly before the Bankruptcy Court was whether Pennsylvania law or Nevada law applies under Section 522(b)(2)(A). *Lowenschuss*, 202 B.R. at 315. Accordingly, we only address the question of which law to apply under Section 522(b)(2)(A). *In re Ehrle*, 189 B.R. at 776.

We start at the same place the Bankruptcy Court started, with the statutory language:

> an individual debtor may exempt from property of the estate . . . any property that is exempt under . . . State or local law that is applicable . . . at the place in which the debtor's domicile has been located for the 180 days immediately preceding the date of the filing of the petition, or for a longer portion of such 180-day period than in any other place.

11 U.S.C. § 522(b). The last clause of this language is rather obscure, but every court to have considered it has construed it as follows: "a debtor must determine prior to filing his petition in bankruptcy where his domicile has been located for the 180 days immediately preceding the date of filing, or *if in more than one place during the 180 days*, where the longer portion of such period was spent." *In re Calhoun*, 47 B.R. 119, 122 (Bankr.E.D.Va. 1985) (emphasis added); *In re Arrol*, 207 B.R. 662, 664 (Bankr.N.D.Cal. 1997); *In re Watson*, 192 B.R. 238, 244 (Bankr.D.Nev. 1996); *In re Volk*, 26 B.R. 457, 459-60 (Bankr. D.S.D. 1983); *In re Walley*, 9 B.R. 55, 56-57 (Bankr.S.D.Ala. 1981); *see also In re Kincaid*, 96 B.R. 1014, 1019 n.1 (9th Cir. B.A.P. 1989), *rev'd on other grounds*, 917 F.2d 1162 (9th Cir. 1990).

Mr. Lowenschuss does not dispute the Bankruptcy Court's conclusion that he lived in Nevada the 92 days immediately prior to filing for bankruptcy. Opening Br. at 31-32 & n.17 (#39). Since 92 days is the "longer portion" of the pertinent 180 days under the statute, we look to Nevada law for determining state exemptions. Mr. Lowenschuss nonetheless argues that the Bankruptcy Court should have given effect to the parties' stipulation below that Pennsylvania law applies. Opening Br. at 33-34 (#39) (citing *Bail Bonds by Marvin Nelson, Inc. v. C.I.R.*, 820 F.2d 1543, 1547 (9th Cir. 1987) and *Lowe v. Jones*, 414 Pa. 466 (1964)). The record indicates that, although it originally accepted the stipulation, the Bankruptcy Court ultimately rejected it. *Compare* Transcript at 5-9 (#39, Appendix at 179-83) *with Lowenschuss*, 202 B.R. at 315. This rejection was proper; on the understanding that this issue is about stipulations (rather than, say, judicial estoppel or prior adjudication), we think a court need not accept a stipulation as to a question of statutory interpretation. *See In re Lindsay*, 59 F.3d 942, 948 (9th Cir. 1995) ("In federal cases . . . such as bankruptcy, the court should apply federal, not forum state, choice of law rules,"). The authority cited by Appellant is not to the contrary. The Bankruptcy Court's choice of law was correct.

VII. How Much of the Plan is Part of the Estate

Finally, we note that in the related case *Selnick v. Lowenschuss (In re Lowenschuss)*, CV-N-93-778-ECR, now on appeal before the Ninth Circuit, the same parties litigating the present adversary proceeding litigated the

validity of the confirmation plan. In vacating the confirmation plan, we concluded as follows:

> In the interval between Selnick's filing of her appellate briefs and the date of the within Order, Bankruptcy Judge Zive has ruled that because Debtor himself was the sole participant in the pension plan established by his business, Debtor's business' pension plan is not a qualified ERISA plan at all, and therefore its assets are not excluded from the bankruptcy estate. That ruling is now the subject of a separate appeal not yet ripe for decision. Moreover, the effect of the instant ruling is to deprive the bankruptcy estate of Beverly Selnick's interest in the pension funds pursuant to the divorce decree itself: *Whether or not the plan qualifies for exclusion from the bankruptcy estate under ERISA. 38.7% of its assets are owned outright by [Ms. Selnick] under the Pennsylvania divorce decree itself.*

July 1, 1994 Order at 11-12 (#45, Appendix at 105-16) (emphasis added).

In other words, it appears that this Court has already determined that at least part of the pension plan (to wit, Ms. Selnick's share) is not part of the bankruptcy estate, not because the plan is ERISA-qualified, but because Ms. Selnick owned her share outright and her share therefore was not a "legal or equitable interest[ ] of the debtor in property as of the commencement of the [proceedings in bankruptcy]." 11 U.S.C. § 541(a). Of course, our observation that this is so "[w]hether or not the plan qualifies for exclusion from the bankruptcy estate under ERISA" was made without the benefit of *Boggs v. Boggs*, 117 S. Ct. 1754 (1997), which had been decided only a month before.

Boggs suggests that if a pension plan is covered by ERISA then there are only limited ways to alienate a beneficiary's interest in the plan. 117 S. Ct. at 1763-64. For this reason, we have considered and affirmed the Bankruptcy Court's conclusion that the Plan is not covered by ERISA, and is therefore not subject to ERISA's strict alienation requirements.

As a result, this Court may already have decided that Ms. Selnick's share of the Plan is not, and never could have been, part of the bankruptcy estate, and that Ms. Selnick may not even be a proper "creditor" of Mr. Lowenschuss at all. *See* 11 U.S.C. § 541(d) ("Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest . . . becomes property of the estate . . . only to the extent of the debtor's legal title to such property."). Under the principle of res judicata, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action. *Lowenschuss*, 202 B.R. at 310 (citing *Montana v. U.S.*, 440 U.S. 147, 153 (1979)). Although not yet final, since it is on appeal, our previous decision might thus bar further litigation of Appellant's claim that "[u]nder Pennsylvania law, the entire Pension Plan is shielded from the reach of [Ms. Selnick as a] creditor[ ] in bankruptcy." Opening Br. at 32 (#39).

To summarize: we have apparently already determined, in a separate adversary proceeding, that Ms. Selnick was awarded an interest in Mr. Lowenschuss' pension plan pursuant to a divorce decree; Mr. Lowenschuss therefore probably had no interest (which could become part of the estate in bankruptcy) in that portion of the Plan awarded to Ms. Selnick; the Plan is not ERISA-

qualified and therefore not subject to ERISA's anti-alienation provisions; and Ms. Selnick's interest in the Plan is probably not subject to any anti-alienation provision enforceable under state law (whether that of Pennsylvania or Nevada). Ms. Selnick presented these points in her brief, but because the pertinent issue on appeal is limited to whether Mr. Lowenschuss' interest in the Plan is part of the bankruptcy estate, Ms. Selnick's points, though well taken, are immaterial to our resolution of the present appeal. Appellee Br. at 17 (#45). The Bankruptcy Court, by always referring to "Mr. Lowenschuss' interest in the Plan," rather than simply to "the Plan," as Appellant refers to it in his briefs, properly recognized the possibility that Ms. Selnick may not even be a creditor at all.

IT IS, THEREFORE, HEREBY ORDERED THAT the Bankruptcy Court's November 1, 1996 Order, is ***AFFIRMED,*** and this action is ***REMANDED*** to the Bankruptcy Court for further proceedings.

DATED: January 29, 1998

/s/ Edward C. Reed
UNITED STATES
DISTRICT JUDGE

202 B.R. 305

Pens. Plan Guide ¶ 23936L

In re Fred LOWENSCHUSS, Debtor.

Bankruptcy No. BK-N 92-31474-GWZ.

United States Bankruptcy Court,
D. Nevada

Nov. 1, 1996.

Bruce T. Beesley and Bridget Robb Peck, Reno, NV, Tom P. Monteverde, Philadelphia, PA, for creditor Beverly Selnick.

Alan R. Smith, Reno, NV, for debtor Fred Lowenschuss.

MEMORANDUM DECISION AND ORDER

GREGG ZIVE, Bankruptcy Judge.

This matter came on regularly for a hearing before Gregg W. Zive, U.S. Bankruptcy Judge, on remand from an order entered August 19, 1994, by U.S. District Court Judge Edward C. Reed ("Remand Order"). The Remand Order vacated the bankruptcy court's order of July 21, 1993 ("Exclusion Order") regarding the exclusion of the Fred Lowenschuss Associates Attorney at Law Pension and Profit Sharing Plan ("Pension Plan") from the estate of the debtor.

Appearing on behalf of creditor Beverly Selnick ("Selnick") were Bruce T. Beesley, Esq. and Bridget Robb Peck, Esq. of Beesley & Peck, Ltd. and Tom P. Monteverde, Esq. of Monteverde & Hemphill. Debtor Fred

Lowenschuss ("Lowenschuss") appeared personally and through his attorney Alan Smith, Esq. of Smith & Cope.

Lowenschuss filed his Chapter 11 petition on August 24, 1992. In his schedules, Lowenschuss listed his interest in the Pension Plan as "exempt and excluded as property of the estate *Patterson v. Shumate*, 504 U.S. 753, 112 S.Ct. 2242, 119 L.Ed.2d 519 (1992); 11 U.S.C. § 522(b)(2)." Lowenschuss' ex-wife, Selnick, filed a timely objection to the exclusion or exemption of the Pension Plan.

Now retired U.S. Bankruptcy Judge James H. Thompson's Exclusion Order denied Selnick's Amended Objection to Exemptions, ruling that the Pension Plan was qualified under ERISA and excluded from the bankruptcy estate. Selnick appealed. Pursuant to the Remand Order, Judge Reed vacated the bankruptcy court's decision regarding the exemption or exclusion of the Pension Plan and directed the bankruptcy court to "convene and conclude the taking of [additional] testimony" regarding the application of the doctrine of *res judicata* and the exclusion/exemption of the Pension Plan assets.

As a result of Judge Thompson's retirement, this court determined it was necessary to hear all of the evidence pertaining to the foregoing matters in order to comply with the Remand Order and to resolve the exclusion/exemption issue. This court, having heard, read and considered the oral and documentary evidence adduced by the parties at the subsequent hearings in this matter; having read and considered the transcripts of prior judicial proceedings and depositions as well as documentary evidence that was admitted in accord with the Remand Order; having reviewed and considered all the pleadings,

records and files in this matter, including the orders from appellate courts pertaining to prior bankruptcy court orders; having considered the demeanor and the credibility of witnesses; and having heard, read and considered the written and oral arguments and authorities submitted on behalf of the parties, is fully advised in the premises and makes the following Memorandum Decision and Order.

FACTUAL BACKGROUND[1]

The Divorce Proceedings

After ten years of contentious litigation, on July 10, 1991, in the Court of Common Pleas of Montgomery County, Pennsylvania, Case No. 81-17813, Beverly Lowenschuss vs. Fred Lowenschuss, Judge Albert R. Subers entered an Order and an Opinion ("Divorce Decree") divorcing the parties and equitably distributing the marital estate as follows:

A. To Plaintiff, Beverly Lowenschuss:

1) Colton Road contents which she possesses: $ 25,000

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[1] Because of the long, torturous history of this case and the attempts of all the parties to resolve their differences in piecemeal litigation and endless appeals throughout the United States in both state and federal courts, a detailed rendition of the facts is necessary. While the court will attempt to be as complete as possible detailing the facts as adduced at trial, the omission of any reference to any discrete fact, occurrence or exhibit should not be interpreted as meaning the court did not consider or weigh that evidence.

2) Cash equivalent of [Lowenschuss'] H.R. 10 Plan plus interest: $ 14,800

3) The Equity in the Colton Road, Gladwynne Pa. – former marital residence: $ 470,000

4) The value of the Diverted Assets $ 830,000
plus interest at 6% to 7/1/91 $ 464,800

5) The fair rental value of Colton Road: $ 292,500
plus interest at 6%: $ 17,500

6) Thirty-eight and 7/10 (38.7%) percent of the value of [Lowenschuss'] Pension Benefit at Fred Lowenschuss Attorney at Law Pension and Profit Sharing Plan from inception to August, 1981 plus interest at 10% compounded annually* (emphasis added): $3,173,490

7) 50% of net value of Merchant's Bond (IN KIND)

$5,288,090

*[Selnick] shall pay any penalty imposed, if any by the Internal Revenue Service on this Portion. [Lowenschuss] shall pay any income tax, if any, imposed by Internal Revenue Service on this portion.

B. To Defendant, Fred Lowenschuss:

1) Funds transferred to Son. Larry plus interest: $ 275,700

2) Colton Road Contents: $ 70,000

3) Motor Vehicles: $ 6,000

4) 61.3% of the Pension and Profit Sharing Plan: $4,936,510

5) 50% net value of Merchant's Bond (IN KIND):

$5,288,210

In his Opinion, Judge Subers found as follows:

> [T]his Court finds that the marital assets should be distributed on the basis of 50% to the Plaintiff and 50% to the Defendant. . . . Our intention is to reduce the amount of her share of the Pension Benefit to the lowest possible amount by awarding the bulk of the other assets to [Selnick] . . . Awarding all of these items then requires less "dependence" of [Selnick] on [Lowenschuss'] pension and profit sharing plan and reduces the percentage due her to 38.7% or $3,173,490.00. *This fund is managed completely by [Lowenschuss] and in view of his past conduct he would attempt in any way to minimize any monies due to [Selnick]* from this fund if periodic payments were ordered. (emphasis added.)

Having ordered Lowenschuss to make the property distribution within three months, Judge Subers concluded as follows:

> We further believe that in view of the extensive litigation which has gone on in this case for over nine (9) years, that [Selnick] should be in no way dependent upon future distributions from the pension plan of [Lowenschuss] particularly since [Lowenschuss] controls said plan. A clean break should be made so that [Selnick] is no longer dependent on the contentions, good will or bad will of [Lowenschuss] as the case

may be and that both parties will no longer need any contact with the other and each can get on with her and his own lives.

Immediately following entry of the Divorce Decree, Lowenschuss began to transfer the assets of the Pension Plan out of Pennsylvania. On August 13, 1991, Lowenschuss made wire transfers of pension funds of eight million dollars from Provident National Bank in Philadelphia, Pennsylvania to Sunbank in Florida and Santa Barbara Bank & Trust in California.

Lowenschuss testified during the divorce proceedings that he was the sole participant in the Pension Plan. The federal Annual Reports for the Pension Plan filed by Lowenschuss prior to the divorce proceedings state that Lowenschuss was the only participant in the Pension Plan. As such, the Pension Plan assets are not shielded by ERISA from Lowenschuss' creditors and were subject to distribution by the Pennsylvania divorce judge.

On January 31, 1992, Lowenschuss failed to appear for an attachment hearing and a bench warrant was issued for his arrest. When Lowenschuss failed to appear at the February 10, 1992 hearing on Selnick's petition for contempt and enforcement of the Divorce Decree, Judge Subers issued a second bench warrant. Also, on the same day, Judge Subers signed an Order ("Freeze Order") freezing all of Lowenschuss' accounts. The Freeze Order provides as follows:

[A]ll assets, Bank accounts, Brokerage accounts, *Fred Lowenschuss Associate Pension Plan,* Fred Lowenschuss IRA or any other account, asset, trust or property subject to the control of Fred Lowenschuss *shall be frozen* and shall not be

> subject to transfer, withdrawal, assignment or expenditure under *any* circumstances, except upon further Order of Court. (emphasis added except '[A]ll' and *'any.'*)

Lowenschuss appealed the Divorce Decree and filed a cross-motion to vacate the Freeze Order and all arrest orders. Selnick filed a Motion to Quash the Appeal based upon Lowenschuss' wilful contempt of court orders. On March 13, 1992, the Pennsylvania Superior Court granted Selnick's Motion to Quash Lowenschuss' appeal and denied Lowenschuss' cross-motion to vacate the Freeze Order and all arrest orders.

Also on March 13, 1992, Judge Subers granted Selnick's motion and entered a final judgment ("Judgment") in the divorce case. The Judgment established a legal basis for Selnick to commence domestication and execution proceedings to enforce the Divorce Decree and provided, in relevant part, as follows:

> [J]udgment is entered in favor of [Selnick] and against Fred Lowenschuss and the *Fred Lowenschuss Associates, Attorneys at Law Pension and Profit Sharing Plan* in the amount of $5,345,090.00 plus interest computed at the rate of six percent (6%) per year beginning on October 10, 1991 on all unpaid distributions. (emphasis added.)

Selnick's Pre-Petition Collection Proceedings

On May 11, 1992 Selnick filed a Petition to Enforce a Foreign Judgment in the District Court of Harris County, Texas. Shortly thereafter Selnick applied for a writ of garnishment to be issued to Zapata Corporation with

respect to Zapata Corporation bonds owned by the Pension Plan. The writ was served on May 29, 1992.

Counsel for the Pension Plan sought to enjoin the enforcement of the Pennsylvania judgment and to dissolve the writ of garnishment on the grounds that (1) the Pension Plan was not a party to the divorce petition, (2) that the Judgment was on appeal and (3) that the Pension Plan assets could not have been awarded to Selnick in the divorce case because the Pension Plan was subject to ERISA and, therefore, a Qualified Domestic Relations Order ("QDRO") was required and not obtained.

On August 6, 1992, the Texas District Court entered an order in favor of Selnick and held as follows:

> After consideration of the evidence and arguments of counsel, the Court is of the opinion [Selnick] has heretofore secured a final judgment against [Lowenschuss] and the Fred Lowenschuss Associates, Attorneys at Law Pension and Profit Sharing Plan . . . , that the judgment is entitled to be accorded full faith and credit by this Court, and that such judgment remains due and unsatisfied."

Selnick's Post-Petition Collection Proceedings

This Chapter 11 bankruptcy was commenced August 24, 1992. Judge Subers' fears that Lowenschuss would employ any method to frustrate Selnick's ability to enforce the Divorce Decree and Judgment were well-founded. When Lowenschuss filed his bankruptcy petition, he and Selnick were involved in execution proceedings pending in Pennsylvania, Minnesota, Texas, California, Florida, New York and New Jersey as Selnick

attempted to locate and execute upon Pension Plan assets. Lowenschuss listed assets of $164,359 and liabilities of $9,126,457.54 in his bankruptcy schedules. Selnick's claim is listed as an unsecured claim for $5,000,000, "disputed contingent and unliquidated."

Without applying to this court to lift the stay of 11 U.S.C. § 362[2], Selnick applied for and received an amended judgment in the Texas state court on September 16, 1992 and a Second Amended Judgment on October 26, 1992. The Second Amended Judgment provides in relevant part as follows:

> [Selnick] has heretofore secured a final judgment against *Judgment Debtor Fred Lowenschuss* and the Fred Lowenschuss Associates, Attorneys at Law Pension and Profit Sharing Plan in the amount of $5,345,090.00, plus interest and certain costs, . . . , that the judgment is entitled to be accorded full faith and credit by this Court, and that such judgment remains due and unsatisfied. . . . *Judgment Debtors Fred Lowenschuss* and the Fred Lowenschuss Associates, Attorneys at Law Pension and Profit Sharing Plan [shall] surrender to the Court the Debenture certificate held for the benefit of Fred Lowenschuss Associates, Attorneys at Law, Pension and Profit Sharing Plan. (emphasis added.)

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[2] Unless otherwise specified, all references to sections of the code shall refer to 11 U.S.C. 101 et seq. and rules references shall refer to the Federal Rules of Bankruptcy Procedure.

BANKRUPTCY PROCEEDINGS

Exclusion/Exemption of Pension Plan Assets

The bankruptcy case was active. It was converted from a Chapter 11 reorganization to a Chapter 7 liquidation and then reconverted, on February 12, 1993, to a Chapter 11. There were numerous motions, adversary proceedings and contested matters regarding a variety of issues and creditors, including objections to creditor's claims and Selnick's objection to Lowenschuss' claimed exemption of the Pension Plan assets.

After extensive briefing and hearings, Judge Thompson ruled that Lowenschuss' claims of exclusion and exemption of the Pension Plan assets were not barred by *res judicata* arising from the 1991 Divorce Decree, the 1992 Pennsylvania Judgment or the 1992 Texas Judgment. Judge Thompson entered Findings of Fact, Conclusions of Law and Judgment regarding the exclusion/exemption issue on July 21, 1993 ("Exclusion Order"). The Exclusion Order denied Selnick's Amended Objection to Exemptions and concluded as follows:

> 1. That the terms of the Pension Plan in existence as of August 24, 1992, comply with the provisions of ERISA, and that the Pension Plan had at least one (1) common-law employee as of that date.
>
> 2. That Selnick has not met her burden of proof to demonstrate that the Pension Plan has no common-law employees, or is otherwise not qualified under ERISA.
>
> Selnick appealed the Exclusion Order to the United States District Court.

The Remand Order of August 19, 1994 vacated Judge Thompson's decision excluding the Pension Plan and remanded the matter to the bankruptcy court. The Remand Order instructed the bankruptcy court to consider additional evidence, including that specified by Judge Reed, and to resolve the issue of whether the Pension Plan should be excluded from the debtor's estate or whether it was exempt.

In the Remand Order, Judge Reed also directed the bankruptcy court to "permit Selnick leave to petition to the Pennsylvania Court to restate its Equitable Distribution order [Divorce Decree] as a QDRO." This court permitted Selnick to petition the Pennsylvania state court to modify the Divorce Decree to be restated as a QDRO. On January 22, 1996, Judge Subers refused to modify the Divorce Decree, concluding he no longer had jurisdiction to modify an order that was entered four and a half years earlier. Selnick appealed. On September 12, 1996, the Superior Court of Pennsylvania vacated and remanded to allow modification, holding that modification is "necessary to carry out the equitable distribution order and give the parties the benefits they were entitled to under the equitable distribution order." Opining on the exclusion/exemption issue, the Pennsylvania Superior Court found as follows:

> . . . [A] plan is not governed by ERISA [and thus excluded from the bankruptcy estate] unless there is more than one participant. In Bankruptcy Court, [Lowenschuss] has claimed, contrary to his prior testimony in the divorce proceeding, that his two sons are also participants in the pension plan and it is therefore governed by ERISA.

The bankruptcy court's decision permitting Selnick to seek modification of the Divorce Decree restated as a QDRO was affirmed by Judge Reed on August 27, 1996.

Lowenschuss's Plan of Reorganization

The Order Confirming Debtor's Plan of Reorganization ("Confirmation Order") was entered October 28, 1993[3]. The Plan of Reorganization was based upon Judge Thompson's decision that the Pension Plan was excluded from the debtor's estate.

Selnick appealed the Confirmation Order. Selnick's appeal of the Confirmation Order was reassigned to Judge Reed so that it could be considered together with her appeal of the Exclusion Order. Lowenschuss sought dismissal of Selnick's Confirmation Order and Exclusion Order appeals, contending the appeals were moot. Judge Reed denied Lowenschuss' motions to dismiss and stated in his April 28, 1994 order as follows:

> [Selnick] is the only significant creditor in this matter and not even 3% of the payments due her under the Plan have been made.
>
> . . . .
>
> The plan or [sic] reorganization has not been substantially consummated. Nor has any event occurred which would render it impossible for the bankruptcy Court to fashion appropriate

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[3] The Confirmation Order was corrected by Judge Thompson in an Order Withdrawing Erroneously Filed Order of Confirmation entered February 9, 1994. The correction is not pertinent to this Order and to reduce confusion, this court will refer to the October 28, 1993 order as the Confirmation Order.

> relief in the event the Order on the Pension Exemption issue is reversed by this Court. To the contrary, in the event of reversal, Selnick and [Lowenschuss'] other creditors will have enforceable claims against the assets of the Pension fund which will greatly exceed what they have been paid to date. In addition, [Lowenschuss] knew at the time the reorganization plan was confirmed that Selnick had appealed the bankruptcy court's decision regarding the exemption issue and fully intended to appeal the confirmation. Under these circumstances, we conclude that this appeal is not moot.

On the same date Judge Reed's Remand Order was signed and filed, August 19, 1994, he also entered an minute order from Minutes of the Court of August 18, 1994. The minute order clarified the status of Selnick's appeal of the Confirmation Order by staying that appeal until the exclusion/exemption issue remanded to the bankruptcy court was resolved. Judge Reed opined, "the bankruptcy plan cannot be confirmed without the issue [exclusion/exemption] being resolved."

That ruling was consistent with the April 28, 1994 Order denying Lowenschuss' motion to dismiss the appeal of the Exclusion Order by finding the Plan of Reorganization was not substantially consummated and that the bankruptcy court could fashion appropriate relief if the Exclusion Order was reversed. In this Memorandum Decision and Order the bankruptcy court is fashioning appropriate relief as detailed below.

Judge Reed confirmed his position regarding the Plan of Reorganization in his order signed and entered August 27, 1996, that affirmed the bankruptcy court's decision

allowing Selnick to seek a QDRO in Pennsylvania. Judge Reed rejected Lowenschuss' argument that there was a confirmed plan that precluded Selnick's actions in Pennsylvania "because the court ruled long ago that the plan could not be confirmed, and stayed proceedings with respect to it in order to allow the exemption issue to be resolved."

LEGAL ANALYSIS

Res Judicata

"[R]es judicata 'ensures the finality of decisions.' " *Americana Fabrics, Inc. v. L & L Textiles, Inc.*, 754 F.2d 1524, 1528-1529 (9th Cir.1985) (quoting *Brown v. Felsen*, 442 U.S. 127, 99 S.Ct. 2205, 60 L.Ed.2d 767 (1979)). Under this theory, "a final judgment on the merits bars further claims by parties or their privies based on the same cause of action." *Montana v. United States*, 440 U.S. 147, 153, 99 S.Ct. 970, 973, 59 L.Ed.2d 210 (1979).

"Res judicata prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding." *Brown v. Felsen*, *supra* at 131, 99 S.Ct. at 2209 (citing *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 378, 60 S.Ct. 317, 320, 84 L.Ed. 329 (1940)). Res judicata (claim preclusion) bars relitigation of claims between the same parties if those claims were or could have been litigated. *In re Daley*, 776 F.2d 834 (9th Cir.1985) (quoting *Nevada v. United States*, 463 U.S. 110, 129-130, 103 S.Ct. 2906, 2918, 77 L.Ed.2d 509 (1983)).

Res judicata should "be invoked only after careful inquiry." *Brown v. Felsen, supra* at 132, 99 S.Ct. at 2210. Res judicata "may govern grounds and defenses not previously litigated" thus blocking "unexplored paths that may lead to truth." *Id.* The Supreme Court opined that if careful inquiry reveals that neither the interests served by res judicata nor the policies of the Bankruptcy Act would be furthered by application of the doctrine, it should not be used. *Id.*

"Whereas res judicata forecloses all that which might have been litigated previously, collateral estoppel treats as final only those questions actually and necessarily decided in a prior suit. [Citations omitted.] If, in the course of adjudicating a state-law question, a state court should determine factual issues using standards identical to those [used in the Bankruptcy Code], then collateral estoppel, in the absence of countervailing policy, would bar relitigation of those issues in the bankruptcy court." *Brown v. Felsen, supra* at 139 n. 10, 99 S.Ct. at 2213 n. 10. "The doctrine of collateral estoppel (issue preclusion) is intended to limit the number of times a defendant may be forced to litigate the same claim or issue, and to promote efficiency in the judicial system by putting an end to litigation." *Peck v. Commissioner*, 904 F.2d 525, 527 (9th Cir.1990).

Under full faith and credit principles, see 28 U.S.C. § 1738, the collateral estoppel effect to be given a state court judgment in bankruptcy court litigation is determined by that state's law, not federal law. *In re McNallen*, 62 F.3d 619 (4th Cir.1995); citing *In re Bugna*, 33 F.3d 1054, 1057 (9th Cir.1994).

It has not been argued that either the Divorce Decree or the Judgment are not final, valid Pennsylvania judgments and would not have res judicata and collateral estoppel effect in Pennsylvania. Those judgments have been appealed, tested and examined and then affirmed or domesticated on numerous occasions within the last five years. They are unquestionably final.

Likewise, the Texas Judgment is also a final judgment and would have preclusive effect. However, that judgment, as reflected in all orders leading to the final Second Amended Judgment of October 26, 1992, is grounded on the Pennsylvania Judgment. The Second Amended Texas Judgment states that Selnick had secured a final judgment against Lowenschuss in the amount of $5,345,090.00, plus interest and costs, that the Pennsylvania Judgment was properly authenticated and was "entitled to be accorded full faith and credit by this court, and that such judgment remains due and unsatisfied." *See, Wu v. Walnut Equipment. Leasing,* 909 S.W.2d 273, 277 (Tex.App.1995), *rev'd on other grounds, Walnut Equip. Leasing v. Wu,* 920 S.W.2d 285 (Tex.1996); *see, Harris v. Harris,* 403 S.W.2d 445, 447 (Tex.Civ.App.1966). In sum, the Texas Judgment was merely a domestication of the Pennsylvania Judgment and, therefore, the claims and issues in the Pennsylvania Judgment are those that may be precluded from relitigation by utilization of res judicata or collateral estoppel.

While a close issue, this court finds that neither the doctrine of res judicata (claim preclusion) nor collateral estoppel (issue preclusion) bar Lowenschuss from contending in his bankruptcy case that his interest in the Pension Plan is either excluded or exempted from the

bankruptcy estate. On June 15, 1992 – nearly one year after the Divorce Decree, four months after the Freeze Order and three months after the Pennsylvania Judgment, the U.S. Supreme Court issued its opinion in *Patterson v. Shumate*, 504 U.S. 753, 112 S.Ct. 2242, 119 L.Ed.2d 519 (1992). The Supreme Court, departing from what had been the generally accepted status of the law, held that a debtor's interest in an ERISA-qualified pension plan was excluded from the bankruptcy estate for the purposes of § 541(c)(2). That issue was not litigated in the 1991 divorce proceeding. It could not have been litigated because there was not a multi-participant plan at the time of the divorce proceedings and because an exemption issue necessarily arises after judgment is entered. Of course, exemptions and property of the bankruptcy estate are determined as of the date the bankruptcy petition is filed (§ 522 and § 541(a)(1)) and Lowenschuss presented evidence of a purported change of circumstances regarding the Pension Plan that occurred after the state court judgments and before his bankruptcy filing date. Finally, the Pennsylvania Judgment and, necessarily, the Texas Judgment are money judgments and arguably did not involve Pension Plan exclusion/exemption issues.

Obviously the parties' divorce and related proceedings and this bankruptcy case have involved years of effort and hundreds of thousands of dollars in fees and costs. This court has reviewed and carefully considered all the evidence and while application of res judicata or collateral estoppel might be appropriate, those doctrines should only be invoked in a manner consistent with the public policy articulated by the Supreme Court in *Brown*

v. Felsen, supra. This court finds that precluding Lowenschuss from litigating his contentions regarding the exclusion/exemption issue would not further the policies of the Bankruptcy Code. There are policies unique to the Bankruptcy Code in resolving exclusion and exemption issues. Declining to apply res judicata in this case, as was the result in *Brown v. Felsen, supra,* at 138, 99 S.Ct. at 2212-13, allows the bankruptcy court to resolve those questions which are now, for the first time, squarely at issue and are the type of questions Congress intended bankruptcy courts to resolve.

Finally, the result would be identical. As explained below, this court has determined that Lowenschuss' interest in the Pension Plan is not excluded for the purposes of § 541 and it is property of the estate and is subject to creditor's claims.

The same result would be obtained if the court did invoke the doctrines of res judicata or collateral estoppel. However, because of the policy concerns regarding those doctrines and the differences between the status of the law and issues and claims before this court and those before the Pennsylvania court which led to the Pennsylvania and Texas judgments, a decision on the merits without precluding Lowenschuss from fully litigating his contentions, is appropriate.

Exclusion of Lowenschuss' Interest in the Pension Plan

On June 15, 1992, three months after the entry of the Pennsylvania Judgment against Lowenschuss and the Pension Plan, the U.S. Supreme Court in *Patterson v.*

Shumate, 504 U.S. 753, 112 S.Ct. 2242, 119 L.Ed.2d 519 (1992) held that a debtor's beneficial interest in an ERISA-qualified pension plan is excluded from the bankruptcy estate pursuant to § 541(c)(2). The Shumate decision resolved a split among the circuits and departed from the prior Ninth Circuit rule that ERISA qualification would not suffice to exclude a debtor's interest in the plan from the estate. *See In re Reed*, 985 F.2d 1026, 1027 (9th Cir.1993).

Two months after the Shumate decision, Lowenschuss had purportedly established residency in Nevada[4] and he filed his Chapter 11 petition on August 24, 1992.

"An estate in bankruptcy consists of all the interests in property, legal and equitable, possessed by the debtor at the time of filing, as well as those interests recovered through transfer and lien avoidance provisions." *Owen v. Owen*, 500 U.S. 305, 308, 111 S.Ct. 1833, 1835, 114 L.Ed.2d 350 (1991); § 541(a)(1). The scope of § 541(a)(1) is broad and has been liberally construed by the courts. *See, United States v. Whiting Pools*, 462 U.S. 198, 205, 103 S.Ct. 2309, 2313, 76 L.Ed.2d 515 (1983).

Section 541(c)(2) is a narrow exception which provides as follows:

> (2) A restriction on the transfer of a beneficial interest of the debtor in a trust that is

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[4] The exact status of Debtor's residence is unclear from the schedules, Lowenschuss lists no real property assets on Schedule A and no residential real property leases on Schedule G.

> enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

Lowenschuss argues that his interest in his Pension Plan is excluded because the Pension Plan is ERISA-qualified and the anti-alienation provision of ERISA, 29 U.S.C. § 1056(d)(1), prohibits a transfer of his interest in the Pension Plan assets to the bankruptcy estate.

The court finds that Lowenschuss has the burden of proof on the issue of exclusion under § 541(c)(2).

> Debtors have the burden of proof to demonstrate by a preponderance of the evidence that their retirement plans contain enforceable anti-alienation restrictions that would permit them to be excluded from the bankruptcy estate under 541(c)(2).

In re Switzer, 146 B.R. 1 (Bankr.C.D.Cal.1992) citing *In re Leimbach,* 99 B.R. 796, 798 (Bankr.S.D.Ohio 1989).

The evidence supports the allegations that Lowenschuss has engaged in unlawful transactions with the assets of the Pension Plan, that he made and repaid loans to himself and his children's trusts, that he commingled the assets of the Pension Plan with his professional operation, and that he has retroactively amended the Pension Plan post-petition in an attempt to insure that Pension Plan assets are excluded from his bankruptcy estate. Lowenschuss has provided the court with cases as authority for the proposition that his conduct is not fatal to qualification of the Pension Plan. *See, Lockheed Corp. v. Spink,* ___ U.S. ___, 116 S.Ct. 1783, 135 L.Ed.2d 153 (1996) (ability of employer to amend pension plan); *In re Baker,* 195 B.R. 386 (Bankr.N.D.Illinois 1996) (even after a fiduciary

engages in inappropriate and, perhaps, prohibited transactions the entire plan is still subject to ERISA).

The *Baker* case is instructive. That court found that even though the debtor was responsible for loans from the plan to the debtor's children and to the debtor himself, and the loans were not made within the terms of the plan, the plan was still subject to ERISA. However in the *Baker* case there were "as many as eighteen participants in the Plan." Further, the *Baker* court cited *Kennedy v. Allied Mutual Ins. Co.*, 952 F.2d 262, 266 (9th Cir.1991) for the following proposition:

> The existence of an ERISA plan is a question of fact, to be answered in light of all the surrounding facts and circumstances from the view of a reasonable person."

In *Kennedy*, the Ninth Circuit Court of Appeals agreed with the District Court for the Central District of California that "a plan whose sole beneficiaries are the company's owners cannot qualify as a plan under ERISA." 952 F.2d at 264. Even if the bankruptcy debtor had previously taken great care to insure that a pension plan was qualified for favorable treatment under the Internal Revenue Code, it has been repeatedly held that single participant plans are not ERISA-qualified. *In re Watson*, 192 B.R. 238, 242 (Bankr.D.Nev.1996); *In re Orkin*, 170 B.R. 751, 754 (Bankr.D.Mass.1994); *In re Hall*, 151 B.R. 412, 421 (Bankr.W.D.Mich.1993), *In re Witwer*, 148 B.R. 930, 936 (Bankr.C.D.Cal.1992).

Since exclusion, exemption and valuation of property of the estate issues are determined at the commencement of the case, § 541(a); § 522(b)(2)(A) and *see e.g., In re Gitts*,

116 B.R. 174, 178 (9th Cir. BAP 1990) *aff'd*, 927 F.2d 1109 (9th Cir.1991), if the debtor is the sole participant in a plan at the time a bankruptcy case is filed, the plan cannot be excluded from the debtor's estate. The U.S. Supreme Court has described ERISA's goal as one of ensuring that a worker receives his or her pension benefits. *Patterson v. Shumate, supra,* at 764-765, 112 S.Ct. at 2249-50 (citing *Nachman Corp. v. Pension Benefit Guaranty Corporation,* 446 U.S. 359, 375, 100 S.Ct. 1723, 1733, 64 L.Ed.2d 354 (1980)). As noted in *Witwer, supra* at 935-936, ERISA "was adopted to remedy the abuses that existed in the handling and management of welfare and pension plan assets held in trust for workers in a traditional employer-employee relationship. [Citations omitted.] *Further, since the plan assets are held for the exclusive benefit of participants and beneficiaries, plan assets are not to inure to the benefit of the employer.* 29 U.S.C. § 1103(c)(1) (1988)." (emphasis added.)

If Lowenschuss was the only participant in the Pension Plan when he filed his bankruptcy petition, the policies and goals of ERISA are not furthered by excluding the Pension Plan assets from the debtor's estate. Instead, the result would be to allow Lowenschuss to enjoy an inequitable windfall at his creditor's expense. Lowenschuss, therefore, has the burden to prove by a preponderance of the evidence that he was not the only employee who was a participant covered under the Pension Plan at the commencement of his bankruptcy case. He has failed to carry that burden. Illustratively, the evidence establishes the following:

1. That from November 1985, through November 30, 1990, all of Lowenschuss' Annual Reports as Trustee

for the Pension Plan (Form 5500) stated that Lowenschuss was the sole participant in the Pension Plan;

2. Lowenschuss and his accountant both testified in the divorce proceedings in February 1991 that Lowenschuss was the sole participant in the Pension Plan;

3. The only documentary evidence of any type of employment by either Laurance or Edward Lowenschuss at Lowenschuss' law firm in 1990, 1991 and 1992 consisted of book entries, rather than canceled checks, for alleged payments to them of $2,000 and $360 respectively as wages in 1990; of $2,000 each for one weeks's work in October, 1991, and of $8,000 each post-petition in November, 1992;

4. All of the documentary evidence used to support Lowenschuss' contention that the Pension Plan was a multi-participant plan at the time the bankruptcy petition was filed, including five amended form 5500s for the years 1985-86 through 1989-90, and a federal income tax return of Fred Lowenschuss Associates for the fourth quarter 1992, had been created by or at the direction of Lowenschuss post-petition;

5. Contrary to his testimony before Judge Thompson, Edward had testified in the Pennsylvania proceedings that he was a college student who worked for his father only during the summers of 1990 and 1991 and not at all during 1992; he had never received payment for those services; that Laurance spent most of his time subsequent to January, 1991, in California rather than in Philadelphia, and that Edward had not seen nor heard from Laurance since the spring of 1992; and

6. There was no documentary evidence that either Laurance or Edward worked the 1,000 hours per year minimum required for Pension Plan participation and that no contributions whatever to the Pension Plan were ever made on behalf of either of them until December, 1992.

This court is convinced that Lowenschuss' sons were not participants in the Pension Plan and that it remained a single participant plan at the time Lowenschuss filed his bankruptcy petition. Despite Lowenschuss' efforts following entry of the Divorce Decree and Judgment to protect the Pension Plan from alienation, the Pension Plan did not satisfy ERISA requirements when this bankruptcy case was commenced and, therefore, it does not comport with the holding of *Patterson v. Shumate, supra,* and Lowenschuss' interest in the Pension Plan is not excluded from the bankruptcy estate.

Lowenschuss has little credibility. His belated attempts to change the Pension Plan from single to multi-participant are a sham. He controlled his sons. This court, as have other courts, finds that Lowenschuss and Edward have changed their testimony in a fruitless attempt to have the Pension Plan be considered ERISA-qualified. All Lowenschuss and his sons have proven is that they will take any convenient position to frustrate Selnick's search for Pension Plan assets to satisfy the Divorce Decree and Judgment, even if those positions are directly contrary to their earlier sworn testimony. They are not to be believed and the evidence they attempted to use to convince this court that the plan had multi-participants and that those participants were Lowenschuss' sons is not credible.

The only conclusion a reasonable person could draw from the years of endless litigation and voluminous evidence adduced at the cost of almost two million dollars in attorney's fees is that Lowenschuss has and will do or say whatever it takes to avoid his obligation to Selnick under the Divorce Decree and Judgment. Lowenschuss virtually closed his law practice in order to avoid the jurisdiction of the Pennsylvania courts. In doing so, he did not keep the normal business and Pension Plan accounting and banking records to support his claims that he had a multi-participant plan. It is also not a coincidence that there was a change in the testimony of Lowenschuss and his sons and the creation of documentary evidence concerning the participation of the sons in the Pension Plan directly after the June 1992 *Shumate* decision. Lowenschuss has hidden assets, ignores or refuses to comply with orders and judgments from a variety of state and federal courts, and has patently attempted to manipulate the judicial system to avoid his long-established obligations.

In light of all the surrounding facts and circumstances this court finds that the Pension Plan is not ERISA-qualified and that Lowenschuss' interest in the Pension Plan assets is property of this bankruptcy estate.

Exemption of Lowenschuss' Interest in the Pension Plan

Since Lowenschuss' interest in the Pension Plan is property of the estate, this court may decide the exemption issue. *In re Spirtos*, 992 F.2d 1004, 1007 (9th Cir.1993); *Owen v. Owen, supra.* Pursuant to § 522(b) Lowenschuss

may claim as exempt certain property of the estate which he takes free and clear of any interest of the estate or claims of creditors. Section 522(b) provides as follows:

> Notwithstanding section 541 of this title, an individual debtor may exempt from property listed in either paragraph (1) or, in the alternative, paragraph (2) of this subsection. . . . Such property is –
>
> (1) property that is specified under subsection (d) of this section, unless the State law that is applicable to the debtor under paragraph (2)(A) of this subsection specifically does not so authorize; or, in the alternative,
>
> (2)(A) any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition at the place *in which the debtor's domicile has been located for the 180 days immediately preceding the date of the filing of the petition, or for a longer portion of such 180-day period than in any other place.* . . . (emphasis added.)

Although Selnick and Lowenschuss stipulated during the evidentiary hearings that Pennsylvania law should be applied to determine the exemption issue under § 522, as held in *In re Watson*, 192 B.R. 238 (Bankr.D.Nev.1996) Nevada law will be applied to determine the exemption issue.

Selnick cited the case of *In re Kincaid*, 96 B.R. 1014, 1019, n. 1 (9th Cir. BAP 1989), *rev'd on other grounds*, 917 F.2d 1162 (9th Cir.1990), for the proposition that "exemption laws of the forum apply, even if they differ materially from exemption rights under the law of the place

where the contract was made or to be performed or where the cause of action arose."

In *Watson*, recalled U.S. Bankruptcy Judge Bert M. Goldwater stated, "It is thus settled that there is an exempt status to debtor's pension plan but the law of Nevada would control. While the situs of the plan is Utah and the construction of its terms is administered under Utah law it is the Bankruptcy Code which determines the place of exemptions." 192 B.R. at 244. A debtor may not flee the jurisdiction of a state's domestic relations courts, set up residence and file bankruptcy in another state, and then claim the more liberal exemption law of the forum that he has escaped. Since the Debtor claimed his domicile was Nevada when he filed this case, he is bound by Nevada's exemption law under § 522(b)(2)(A).

APPOINTMENT OF A CHAPTER 11 TRUSTEE

Section 1141 provides that upon confirmation of the plan, all property of the estate is revested in the reorganized debtor and the property dealt with in the plan is free and clear of all claims and interests of creditors. Except as provided in the confirmed plan, all pre-confirmation claims are discharged. A discharge voids any pre-confirmation judgment, "to the extent that such judgment is a determination of the personal liability of the debtor." § 524(a)(1). Also, a discharge operates as an injunction against the continuation of any action to collect on a pre-confirmation claim which is "a personal liability of the debtor." § 524(a)(2).

Until entry of this Memorandum Decision and Order, the assets of the Pension Plan have not been property of

the estate and were not dealt with in the plan; consequently those assets have not revested in the debtor and were not subject to the jurisdiction of this court. They are now. Creditors who have claims against the assets of the Pension Plan must file a proof of claim in this case and will be paid according to the provisions of the Bankruptcy Code. All actions against the assets of the Pension Plan are hereby stayed pursuant to § 362(a).

This court is aware of previous futile efforts by other courts to obtain control over the Pension Plan assets. On August 20, 1985, in reaction to Lowenschuss' commingling of the assets of the Pension Plan, his professional corporation and the children's trusts, Judge Subers assumed jurisdiction over Lowenschuss as Plan Administrator and Trustee of the Plan. Judge Subers enjoined Lowenschuss from withdrawing assets from the Pension Plan or making any distributions from the Plan. Lowenschuss subsequently conveyed all his assets except the stock in his professional corporation to trusts for his children and transferred more than two million dollars from the Pension Plan to himself as trustee for the children.

On August 13, 1991, one month after the July 10, 1991 Divorce Decree, Lowenschuss made wire transfers of Pension Plan funds totaling more than eight million dollars in an effort to prevent Pennsylvania courts from controlling his use of the funds. Finally, Judge Subers froze the assets of the Pension Plan on February 10, 1992.

In 1992 a second judge attempted to obtain control of the Pension Plan assets. New Jersey U.S. Bankruptcy

Judge Rosemary Gambardella froze the assets of the Pension Plan in the Resorts International, Inc. bankruptcy case because she "could not ascertain the location of the money [Lowenschuss] received in exchange for the alleged illegal tendered Resorts stock, in order to enjoin the dissipation or transfer of the money." *In re Lowenschuss*, 67 F.3d 1394, 1396 (9th Cir.1995).

Judge Thompson converted this case to a Chapter 7 on January 5, 1992 because of Lowenschuss' failure to abide by orders of the Nevada bankruptcy court.

This court froze the Pension Plan assets on November 27, 1995.

This court has no evidence that Lowenschuss has abided by any of those orders. Further, Lowenschuss has the power to effect a change in the trustee at any time, to terminate the Pension Plan at any time and to transfer virtually all of the assets to himself. There can be no doubt that is precisely what Lowenschuss will do if given the opportunity.

Based on the foregoing, this court has serious reservations about allowing Lowenschuss, or his son Laurance, the current hand-picked trustee of the Pension Plan, unfettered control over the Pension Plan assets of this bankruptcy estate.

THEREFORE IT IS HEREBY ORDERED that Selnick's October 13, 1995 Renewed Motion for Appointment of a Chapter 11 Trustee is GRANTED for the following reasons:

1) Pursuant to § 1104(a)(1) based on Lowenschuss's pre-petition transfers of funds and personal flight to Nevada to avoid jurisdiction of the Pennsylvania courts; and

2) Pursuant to § 1104(a)(2) because the Court believes it is in the best interests of creditors to have an independent, disinterested trustee to administer the estate and to pursue any unauthorized transfers of estate property by any person, entity or individual. Lowenschuss may be liable to the estate for unauthorized post-petition transfers of estate property. § 549(a); *Spirtos*, 992 F.2d at 1006.

IT IS FURTHER ORDERED that Lowenschuss shall submit to the Chapter 11 Trustee, the Assistant U.S. Trustee, and this court, no later than November 6, 1996 at 12:00 noon, 1) a complete list of the Pension Plan assets; 2) the location of all Pension Plan assets; and 3) the names, current addresses and telephone numbers of all persons or entities in control of Pension Plan assets, including, but not limited to the current trustee of the Pension Plan.

IT IS FURTHER ORDERED that if Lowenschuss fails to comply with the terms of this Order, the case will be immediately converted to Chapter 7 and, additionally, failure to report as ordered will subject Lowenschuss to this court's contempt and sanction powers as provided by the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure and any other applicable authority. *See, e.g., In re Rainbow Magazine, Inc.*, 77 F.3d 278 (9th Cir.1996).

IT IS FURTHER ORDERED that the Nevada state exemption law will be determinative of the validity and amount of Lowenschuss' allowable exemptions under

§ 522 and that an evidentiary hearing will be set to determine that issue.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: FRED LOWENSCHUSS, Debtor. FRED LOWENSCHUSS, individually and in all capacities, Appellant, and LAURANCE LOWENSCHUSS, Trustee of the Fred Lowenschuss Associates Attorneys at Law Pension and Profit Sharing Plan, Intervenor-Appellant, v. BEVERLY SELNICK, Appellee.	No. 98-15292 D.C. No. 96-00767-ECR ORDER (Filed April 28, 1999)

Before: SNEED, HALL, and RYMER, Circuit Judges.

The panel has unanimously voted to deny appellant's petition for rehearing and suggestion for rehearing en banc. The petition has been circulated to the full court and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.